CLERK'S COPY

Supreme Court of the United States

OCTOBER TERM, 1944

No. 618

A. H. PHILLIPS, INC., PETITIONER,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1944.

CERTIORARI GRANTED DECEMBER 4, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1943.

No. 3979.

A. H. PHILLIPS, Inc.,

DEFENDANT, APPELLANT.

v.

L. METCALFE WALLING,

Administrator of the Wage and Hour Division, Department of Labor,

PLAINTIFF, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.
FROM JUDGMENT (FORD, J.), SEPTEMBER 20, 1943.

TRANSCRIPT OF RECORD.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
for Appellant.

ARCHIBALD COX, Associate Solicitor,
Department of Labor,
for Appellee.

TABLE OF CONTENTS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1943.

No. 3979.

A. H. PHILLIPS, INC.,
DEFENDANT, APPELLANT,
v.
L. METCALFE WALLING,
ADMINISTRATOR OF THE WAGE AND HOUR DIVISION,
DEPARTMENT OF LABOR,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 1811, Civil Action.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff,
v.
A. H. PHILLIPS, Inc., Defendant.

APPEAL OF A. H. PHILLIPS, INC., DEFENDANT, FROM FINAL JUDGMENT ENTERED ON SEPTEMBER 20, 1943.

The Complaint in this cause was filed on March 2, 1942, and was duly entered at the December Term of this court, 1941, and is as follows:

COMPLAINT.

[Filed March 2, 1942.]

[MEMO.: The complaint in this cause was brought in the

name of Thomas W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor, for whom by stipulation of parties L. Metcalfe Walling was substituted by order of court entered on April 21, 1942. JAMES S. ALLEN, *Clerk.*]

I. Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C., Title 29, Sec. 201, *et seq.*), hereinafter called the Act.

II. Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the Commonwealth of Massachusetts, having its principal office and place of business in the City of Springfield, Hampden County, Massachusetts, within the jurisdiction of this court, and is, and at all times hereinafter mentioned was, at Springfield, Massachusetts, engaged in the acquisition, handling and distribution of goods in interstate commerce, said goods including canned goods, bottled goods, meats, vegetables, groceries, cigarettes, candy, coal and numerous other items.

IV. At all times hereinafter mentioned defendant has operated and is operating an establishment located in Springfield, Massachusetts, at 59 Napier Street, and at all times hereinafter mentioned has employed and is now employing upwards of 30 employees in and about said establishments in the acquisition, handling and distribution of the aforesaid goods. The goods acquired, handled and distributed as aforesaid are and at all times hereinafter mentioned were for the most part purchased and transported in interstate commerce from and through states other than the Commonwealth of Massachusetts to the aforesaid establishment at Springfield, Massachusetts, and have been at all times hereinafter mentioned and are now being transported, shipped and

delivered from said establishment in interstate commerce for the purpose of sale to other places within Springfield, Massachusetts, and to, into and through states other than the Commonwealth of Massachusetts.

V. During the period beginning October 24, 1938, the effective date of Section 7(a)(1) of the Act, and repeatedly thereafter through October 23, 1939, defendant employed many of its aforesaid employees, who were engaged in the acquisition, handling and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a)(2) of the Act, and repeatedly thereafter through October 23, 1940, defendant employed many of its aforesaid employees, who were engaged in the acquisition, handling and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1940, the effective date of Section 7(a)(3) of the Act, and repeatedly thereafter, defendant has employed many of its aforesaid employees, who were engaged in the acquisition, handling and distribution of goods in interstate commerce, as aforesaid, for workweeks longer than forty (40) hours, and has failed and refused to compensate the said employees for their employment in excess of forty (40) hours in such workweeks at rates not less than one and

one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act.

VI. During the period beginning on or about October 24, 1938, and repeatedly to the date hereof, defendant has shipped, delivered and transported in interstate commerce from the said establishment in Springfield, Massachusetts, to, into and through states other than the Commonwealth of Massachusetts, goods acquired, handled and distributed by it at Springfield, Massachusetts, in the acquisition, handling and distribution of which and in processes or occupations necessary to the acquisition, handling and distribution thereof many of its employees were employed in violation of Section 7 of the Act, as alleged in paragraph V hereof. By shipping, delivering and transporting in interstate commerce, as aforesaid, the said goods, defendant has violated and is violating the provisions of Section 15(a)(1) of the Act.

VII. On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VIII. During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the pro-

visions of the Act and to the regulations referred to in paragraph VII hereof, has failed and refused to make, keep, and preserve, as prescribed by said regulations, adequate records of the persons employed by it and of the wages, hours, and other conditions and practices of employment maintained by it, in that the records made, kept and preserved by the defendant fail to show adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid; the wages at the regular rate of pay for each workweek (excluding extra compensation attributable to the excess of the overtime rate over the regular rate), and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, with respect to many of its said employees. By failing and refusing to make, keep, and preserve adequate records as prescribed by the said regulations, defendant has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act.

IX. During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in paragraph VII hereof, has made and recorded or caused to be made and recorded in its records of persons employed by it and of the wages and hours of employment maintained by it, entries concerning hours worked by many of its employees, which entries are inaccurate and do not comply adequately with the requirements of the Act and of said regulations. By making and recording, or causing to be made and recorded in its said records the said inaccurate and inadequate entries, defendant has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act.

X. Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act and threatens and intends to continue to violate the said provisions unless enjoined and restrained by a judgment of this court.

XI. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act

Wherefore, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

WARNER W. GARDNER, *Solicitor.*
IRVING J. LEVY,
Associate Solicitor.
VERNON C. STONEMAN,
Regional Attorney.
CHARLES H. McCUE,
Associate Attorney.

Post Office Address: Wage and Hour Division U. S. Department of Labor, 294 Washington Street, Boston, Massachusetts.

This cause was thence continued to the March Term, 1942, when on March 28, 1942, the defendant filed the following Answer:

DEFENDANT'S ANSWER.
[Filed March 28, 1942.]

FIRST DEFENSE.

The Fair Labor Standards Act of 1938 does not apply to defendant nor to defendant's employees because the defendant's employees are not engaged in interstate commerce nor in the production of goods for interstate commerce within the meaning of said Act.

SECOND DEFENSE.

The Fair Labor Standards Act of 1938 does not apply to defendant nor to defendant's employees, none of whom are subject to the provisions of Sections 6 and 7 of said Act under the exemptions provided in Section 13 (a) (2) thereof.

THIRD DEFENSE.

Certain employees of defendant come within the description of Section 13 (b) (1) and accordingly Section 7 of said Act would not apply to such employees.

FOURTH DEFENSE.

I. The defendant admits the purpose of the plaintiff as alleged in paragraph I as within the provisions of the Act but denies that the defendant has violated any provision of the Act.

II. The defendant denies that jurisdiction of this action is conferred upon this court by Section 17 of the Act as alleged in the plaintiff's complaint.

III. Defendant admits the allegations contained in paragraph III of the complaint except that defendant denies that it was or is engaged in the acquisition, handling and distribution of goods in interstate commerce.

IV. The defendant admits that it was and is operating an establishment located at Springfield at 59 Napier Street, and at all times is and has been employing approximately thirty employees in and about said establishment, but denies the allegation that it acquired, handled, and distributed said goods in violation of Sections 6 and 7 of the Act and denies all the other allegations in said paragraph IV.

V. The defendant denies all the allegations in paragraph V of the plaintiff's complaint.

VI. The defendant denies the allegations contained in paragraph VI of the complaint.

VII. The defendant admits the allegations contained in paragraph VII of the complaint.

VIII. The defendant denies the allegations contained in paragraph VIII of the complaint.

IX. The defendant denies the allegations contained in paragraph IX of the complaint.

X. The defendant denies the allegations contained in paragraph X of the complaint.

XI. The defendant denies the violations referred to in paragraph XI of the complaint and therefore denies that the judgment would be authorized.

Wherefore, the defendant demands that this action be dismissed and for such other relief as may be appropriate.

JOSEPH B. ELY,
1387 Main St., Springfield, Massachusetts,
FREDERICK M. KINGSBURY,
1387 Main St., Springfield, Mass.,
EDWARD T. COLLINS,
208 Broadway, Springfield, Mass.,
Attorneys for Defendant.

This cause was thence continued from term to term to the March Term, 1943, when on April 22, 1943, the parties filed stipulation of facts.

[MEMO: The stipulation is here omitted as it appears in its entirety in the opinion of the court at pages 11–17 of this record. JAMES S. ALLEN, *Clerk.*]

On the same day, the cause came on for hearing on the pleadings, testimony, and stipulated facts, the Honorable Francis J. W. Ford, District Judge, sitting, and was taken under advisement.

On April 23, 1943, the following Stipulation was filed:

STIPULATION.

[Filed April 23, 1943.]

In the above-entitled matter it is hereby stipulated as follows:

If the provisions of the Fair Labor Standards Act are found to be applicable to any or all of its employees, the defendant will compute the wages due such employees as a result of its failure to pay its employees in accordance with the provisions of the Act. The sums found due will be submitted to be approved by the Wage and Hour Division within 60 days of a final decision by

the Supreme Court of the United States or within 60 days of the expiration of the date of the defendant's right to appeal from the District Court of Massachusetts or the First Circuit Court, and the payment to the employees shall be made within 30 days of approval by the Wage and Hour Division.

Any judgment which may be issued against the defendant shall not be construed to prohibit the shipment, transportation of sale by the defendant of goods on hand at the time of the issuance of the judgment or to prohibit the defendant from thereafter conducting activities which do not constitute violations of the Fair Labor Standards Act.

VERNON C. STONEMAN,
Regional Attorney, Wage and Hour Division.

JOSEPH B. ELY,
Attorney for Defendant.

This cause was thence continued to the June Term, 1943, when on June 22, 1943, the court announced its decision, and ordered a decree for the plaintiffs.

This cause was thence continued to the present September Term, 1943, when on September 20, 1943, the following Judgment is entered:

JUDGMENT.
September 20, 1943.

This cause came on to be heard by this court without a jury and was argued by counsel, and an opinion, containing findings of fact and conclusions of law, having been filed therein by this court on June 22, 1943, and plaintiff having filed a motion for judgment, it is hereby

Ordered, adjudged and decreed that defendant, its officers, agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections

15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U.S.C. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act in any of the following manners:

(1) The defendant shall not, contrary to Section 7 of the Act, employ any of its central office and warehouse employees for a workweek longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

(2) The defendant shall not, contrary to Section 15(a)(1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, as defined by the Act, or ship, deliver or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in paragraph (1) of this judgment, provided that this paragraph shall not be construed to prohibit the shipment, transportation or sale by the defendant of goods on hand at the time of the issuance of the judgment or to prohibit the defendant from thereafter conducting activities which do not constitute violations of the Fair Labor Standards Act.

(3) The defendant shall not fail to make, keep, and preserve records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Section 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

It is further ordered, adjudged, and decreed that the stipulation between the parties which was filed herein on April 22, 1943, be, and it hereby is, incorporated in and made a part of this judgment, and that defendant do and perform each and every act and thing set forth in said stipulation; and it is

Further ordered, adjudged, and decreed that no costs or disbursements be allowed.

Dated: September 20, 1943.

FRANCIS J. W. FORD,
United States District Judge.

From the foregoing judgment the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

OPINION.

June 22, 1943.

[50 Fed. Supp. 749.]

FORD, *J.* This is an action brought under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A., Sections 201, *et seq.* (hereinafter called the Act), to enjoin violations of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Act.

The facts have been stipulated and are adopted by me as my findings of fact. They are:

BUSINESS.

The defendant is a Massachusetts corporation with its principal and sole office at Springfield, Massachusetts. In pursuance of its business of selling food and other grocery items at retail from its various stores it purchases such commodities in the course of its business and distributes the same from its central warehouse at Springfield, Massachusetts to its several stores in Massachusetts and Connecticut. It operates a chain of approximately forty-nine retail stores of which about forty are in Massachusetts and about nine in Connecticut. It has its warehouse and office at 21 Napier Street, Springfield, Massachusetts.

It does an annual business of approximately $1,500,000. The merchandise handled consists of most of the nationally-known brands of canned fruits and vegetables, soap, flour and other

staples, cigarettes, and fresh fruits and vegetables, bread and milk, etc. It also handles some canned products packed and sold to it under its own private labels. About 18 per cent of its dollar volume is sold through its Connecticut stores from merchandise shipped from the central warehouse in Springfield.

The business is very competitive and wages are the largest item of cost outside the cost of merchandise.

THE WAREHOUSE.

The physical facilities of the warehouse consist of a two-story building and other connected one-story buildings and a garage which houses the defendant's nine cars. The aggregate floor space of the warehouse buildings is approximately two hundred fifty thousand square feet. The warehouse is served by a direct railroad siding with a freight-receiving platform which accommodates eight freight cars. Approximately two-thirds of the merchandise handled by the defendant is delivered to it directly at this siding in carload lots.

The warehouse has a usual inventory of $175,000 to $200,000 which is approximately 15 per cent of the amount of goods handled by the defendant each year. A record of the warehouse inventory is maintained by means of a card index, the so-called Power's System, each card representing a certain number of units of a particular commodity. As shipments are made of the commodity, an appropriate number of cards is withdrawn from the file, so that an examination of the cards remaining in the file will indicate the size of the warehouse's stock of the commodity in question. When it thus appears that the warehouse inventory of a particular item is low in relation to the prospective demand from the stores, additional merchandise is ordered. Occasionally purchases are made in advantageous markets without regard to the Power's System. There is a considerable amount of regularity in the demand from the retail stores for the particular commodities, and the requirements to meet this demand from week to week can be anticipated.

The warehouse sometimes receives requisitions for commodities of which the warehouse has exhausted its supply. In such cases, the requisition is kept on file and is filled with the first regular shipment after the warehouse supply has been replenished.

About 80 per cent of the merchandise handled in the warehouse is received from outside the State of Massachusetts. For example, potatoes are imported from Maine, oranges from Florida, flour from Buffalo, New York, and other points outside Massachusetts, cigarettes from the Carolinas, peas from Walla Walla, Washington, butter from Iowa. At least two-thirds of this merchandise arrives by rail and most of the balance by common carrier truck. Small rail shipments are not delivered to the defendant's siding, but are picked up at the railroad station by the defendant's trucks. These trips, which are made about three times per week, are ordinarily made by the same driver, but if the other drivers are not busy, they are also used for this purpose. Most of the merchandise received at the warehouse arrives in carload lots, and is unloaded from the cars onto the freight-receiving platform by the defendant's warehouse employees, sometimes assisted by the truck drivers. This merchandise is then taken by the defendant's warehouse employees into the warehouse, where some of it is sent to the broken lot department on the second floor of one of the warehouse buildings to be broken up into small units, and the balance is stored in the warehouse in the original unbroken containers.

THE STORES.

Each store is physically separate from the warehouse and office, and from each other store. The forty-nine stores are located in approximately sixteen cities and towns in the States of Massachusetts and Connecticut. When more than one store is situated in a particular city or town, they generally are so located as to serve distinct competitive areas, and not to supplement each other's service to the same section of the consuming public. All the retail stores are located within a thirty-five mile radius of Springfield.

The defendant maintains separate accounts for each store. It keeps a record of the inventory of each store and of transfers of goods from one store to another, and a record of the cash deposits of each store. Merchandise is supplied to each store on the basis of requisitions prepared by the individual store manager, subject to revision by one of the three superintendents, each of whom supervises a group of stores.

DISTRIBUTION.

The merchandise delivered at the warehouse is in turn distributed by the defendant to its retail stores by means of its fleet of six to nine trucks. The shipments for the stores are prepared by the defendant's warehouse employees and are loaded by them, with the assistance of the drivers, onto the defendant's trucks for delivery to the stores. The defendant's truck drivers are used interchangeably in making such deliveries within and without the State of Massachusetts. All merchandise delivered to the retail stores passes through the warehouse first, except bread, pastry and milk. Consequently, even the merchandise procured within Massachusetts by the warehouse is included in the shipments from the warehouse to the out-of-state stores, and it is known by the defendant, at the time such merchandise is ordered and received by the defendant from its sources within the State of Massachusetts, that the merchandise is destined, in part, for the retail stores in Connecticut.

A regular order is delivered once each week to each store, and additional short deliveries, including fresh fruit and vegetables, are delivered as needed. Deliveries go to Connecticut more often than once a week, since the Connecticut stores, like the Massachusetts stores, get their weekly orders on different days. Deliveries are based upon requisitions sent in by the individual store managers. Invoices are made out for each shipment of goods from the warehouse to each store, and separate accounts and inventories are maintained for each retail store.

Bread, pastry and milk are received by the individual stores on

"direct deliveries" from local sources. The prices and terms of sale of these articles are negotiated by the office, but direct deliveries of merchandise are made upon requisition of the store manager. The office in Springfield receives the invoices for all these direct deliveries, including those made to the Connecticut stores from Connecticut sources, and the Springfield office makes payment for such deliveries.

MERCHANDISE TURNOVER.

The business is very competitive and in the interest of economy and profitable operation, rapid turnover of the warehouse inventory is an objective, to avoid loss through spoilage, deterioration and depreciation, and the tying up of too much capital in inventory. The defendant handles about eleven hundred items, and although the broken lot department of the warehouse handles about one thousand items, ninety per cent of the merchandise is shipped out in the original unbroken packages. The average turnover of the warehouse stock is about twelve times annually, but some individual items are turned over more frequently. For example, fresh citrus fruits and certain fresh produce are turned over weekly; cigarettes weekly; some brands of coffee weekly; potatoes weekly. Other items are turned over more slowly—soap about every sixty days; coal about once a month; some brands of coffee three to six times a year.

DUTIES OF WAREHOUSE AND OFFICE EMPLOYEES.

The functions of the office employees are, among other duties, to check invoices, pay bills, check direct deliveries, keep records of the warehouse inventory, maintain the retail store inventories, keep a record of the retail stores' cash, check store credits, and make out payrolls for office, warehouse and store employees. There is no segregation of the time spent by these employees in performing these services as between the activities relating to goods which cross state lines on their way to or from the defendant's warehouse. The employees who work on payrolls, handle

payrolls for all employees at the warehouse, office and the retail stores.

The superintendents work from the office and supervise the stores, and their duties include the revision of the store manager's requisitions on the warehouse, the collection of each store's daily cash receipts, the deposit of these receipts in the defendant's bank account, etc. Two of the superintendents supervise the stores in Massachusetts, the other supervises the Connecticut stores and some Massachusetts stores.

The receiving clerk keeps a record of the incoming shipments to the warehouse and supervises the unloading of these shipments. There is no segregation of his time as between shipments arriving from within the State of Massachusetts and those arriving from other states.

The employees in the billing department check orders from the stores and make out invoices covering shipments to the stores. There is no segregation of their time as between orders for and shipments to stores in Massachusetts and stores in Connecticut.

The shipping clerk has charge of shipments from the warehouse to the stores and supervises the bagging of coal and the preparation of orders for the stores. There is no segregation of his time as between shipments to stores in Massachusetts and stores in Connecticut.

The warehouse men and warehouse helpers unload incoming shipments onto the receiving platform, carry the merchandise, in the original containers, in the warehouse, and make up outgoing shipments which consist chiefly of original containers. The warehouse employees in the broken lot room divide cases of merchandise into smaller units for subsequent shipment to the stores in both states. There is no segregation of the time spent by these employees as between receipts from and shipments to points within and without the State of Massachusetts.

The drivers help load the trucks and occasionally help to unload incoming shipments, in addition to their regular driving

duties. The drivers are used interchangeably on trips to the stores in Connecticut.

The greater part of the time of the aforementioned employees is devoted each week to work relating to goods which are to be sold through the Massachusetts stores.

WAGES, HOURS AND RECORDS.

Prior to October, 1941, the defendant did not maintain the records specified in Part 516 of the Regulations for any of the aforementioned employees.

Prior to April, 1941, the defendant did not pay its drivers on the basis of time and a half for hours worked in excess of the maximum prescribed by the Act.

The payroll records as to drivers are incorrect in that they do not show the hours worked by the drivers in excess of fifty hours each week since it was the defendant's policy to disregard hours worked in excess of fifty.

Prior to December, 1941, the defendant did not pay its employees in the warehouse on the basis of time and a half for hours worked each week in excess of the maximum prescribed by the Act and did not maintain the records specified in Part 516 of the Regulations, as to employees in the warehouse.

The defendant did not pay the office employees overtime compensation at time and a half for hours worked in excess of the maximum prescribed by the Act and did not maintain the records required in Part 516 of the Regulations as to the office employees.

The defendant sets up in its answer the following defenses:

(1) That the Act does not apply to it or to its employees in the central office or warehouse (it is not contended by the Administrator that the employees of the retail stores are within the coverage of the Act) because they are not engaged in commerce or in the production of goods for commerce.

(2) That it is a retail establishment within the meaning of Section 13 (a) (2) of the Act and hence all its employees are exempt.

(3) That the truck drivers are exempt from the provisions of Section 207 (maximum hours) of the Act under the provisions of Section 13 (b) (1).

It is settled in view of the decisions in *Southland Gasoline Co.* v. *Bayley* and *Richardson* v. *The James Gibbons Co.*, United States Supreme Court, dated May 3, 1943, and *Walling* v. *Silver Bros. Co., Inc.*, 1 C.C.A., dated May 21, 1943, that the truck drivers referred to in the stipulation are exempt from the provisions of Section 207 of the Act under Section 13 (b) (1). They were engaged in transporting goods in interstate commerce as will be seen later.

The question remaining is whether the central office and warehouse employees are entitled to the benefits of the Act.

It would serve no good purpose to discuss in detail the principles of law applicable to the present case inasmuch as the defenses of the defendant here are disposed of quite adequately by the case of *Walling* v. *American Stores Co.*, 133 F. (2d) 840. That is a case whose facts are sufficiently similar to those of the present case to justify this court in deciding it is decisive of the contentions made by the defendant, (1) that the defendant was a retail establishment, the greater part of whose selling is in intrastate commerce and hence exempt under the provisions of Section 13 (a) (2) of the Act and (2) that the employees of the central office and warehouse were not engaged in interstate commerce. To be sure, the American Stores Company, as the defendant argues, was a much larger organization than the defendant but the character of the defendant's business and of the employees' work was similar. And, as was said in the case of *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 524: " . . . the provisions of the Act expressly make its application dependent upon the character of the employees' activities".

With respect to the contention that the defendant was not a retail establishment, it seems plain from the legislative history that is so clearly set out in the *American Stores* case, that the defendant's warehouse and central office establishments could not

be said to be a retail establishment "comparable to the intrastate 'local' or 'corner grocery man', 'druggist', 'meat dealer', 'filling-station man', or even 'department store' about whom the legislators were concerned". (P. 844.) (*Cf. Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571, where the Supreme Court stated: "It is quite clear that the exemption in 13 (a) (2) was added to eliminate those retailers located near the state lines in making some interstate sales", such as the corner grocery man, etc.)

As to the defense that the employees of the central office and warehouse were not engaged in interstate commerce, an answer may be easily found with respect to the facts here in the *Jacksonville Paper Company* and *American Stores* cases, *supra.* As stated above, the business in this case and the *American Stores* case was similar; the warehouses in the *American Stores* case delivered only to the retail stores in the state in which the warehouse was situated. We have not in the present case, nor did the court have in the *American Stores* case (see p. 846) a situation comparable to " 'goods acquired and held by a local merchant for local disposition,' . . . but rather a situation where goods are shipped from one state and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets". Consequently here, as in that case, there are present the following facts: that the defendant's warehouse supplied merchandise to its own retail stores and no others; that the goods in the warehouse had a fairly rapid turnover; that purchases were made in anticipation of the requirements of the retail stores; and there was a continuity of movement of goods until they reached the retail stores in Massachusetts—and up to that point in interstate commerce. It will be noted that the present case is a stronger one than the *American Stores* case for the conclusion finally reached that the employees in the central office and warehouse are in interstate commerce because in the present case the defendant shipped eighteen per cent of its goods to the State of Connecticut with no segregation of duties on the part of the employees involved with respect to the merchandise

shipped to its stores in Massachusetts and in Connecticut. (*Cf. Walling* v. *Jacksonville Paper Company,* 128 F. (2d) 395, 398, where it is stated: "Those who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce, whether they write the letters, keep the books, or load and unload or drive the trucks.")

The case of *Walling* v. *Silver Bros. Co., Inc., supra,* decided since the present case was argued, does not disagree with the conclusion in the *American Stores* case on the facts presented there. To be sure, the court distinguished the latter case from the *Silver Bros.* case but it indicated that if the facts in the *Silver Bros.* case were similar to those in the *American Stores* case (as they are in the present case) it would have followed the *American Stores* case.

I conclude that the employees of the central office and warehouse of the defendant are subject to the provisions of the Act. In the light of the conclusions reached, the violations of the Act being admitted, a decree will be entered for the plaintiff in accordance with this opinion.

NOTICE OF APPEAL.

[Filed December 18, 1943.]

Notice is hereby given that A. H. Phillips, Inc., defendant above-named hereby appeals to the Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on September 20, 1943.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Attorneys for Appellant,
A. H. PHILLIPS, INC.,
Address: 1387 Main Street, Springfield, Mass.

On the eighteenth day of December, 1943, the defendant filed a bond on appeal in the sum of two hundred fifty dollars, Peerless Casualty Company of Keene, New Hampshire, acting as surety.

STATEMENT OF POINTS.

[Filed January 25, 1944.]

The points upon which appellant intends to rely in this appeal are as follows:

1. The court erred in not finding and ruling that the defendant is a "retail establishment" within the meaning of the exemption in Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C., Title 29, Sec. 201, *et seq.*).

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Attorneys for Appellant,
A. H. PHILLIPS, INC.,
Address: 1387 Main Street, Springfield, Mass.

DESIGNATION OF RECORD.

[Filed January 4, 1944.]

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Defendant's answer to complaint.
3. Stipulation agreeing as to facts.
4. Stipulation regarding matters and things to be done depending upon outcome of this litigation.
5. Opinion.
6. Judgment.

7. Notice of appeal.
8. This designation.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Attorneys for Appellant,
A. H. PHILLIPS, INC.,
Address: 1387 Main Street, Springfield, Mass.

CLERK'S CERTIFICATE.

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the record on appeal in the cause entitled:

No. 1811, Civil Action.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff,
v.
A. H. PHILLIPS, Inc., Defendant,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said District, this ninth day of March, 1944.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including March 17, 1944, is here omitted. A. I. CHAMON, *Clerk.*]

[fol. 23] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On June 7, 1944, this case came on to be heard, and was fully heard by the Court, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, and Honorable Arthur D. Healey, District Judge, sitting.

Thereafter, to wit, on the twentieth day of July, A. D. 1944, the following Opinion of the Court was filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1943

No. 3979

A. H. PHILLIPS, INC., Defendant, Appellant,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, Department of Labor, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Mahoney, Woodbury and Healey, JJ.

Joseph B. Ely, Frederick M. Kingsbury, Edward T. Collins, for Appellant.

Archibald Cox, Associate Solicitor, Department of Labor, for Appellee.

OPINION OF THE COURT—July 20, 1944

MAHONEY, J.:

This action was brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under § 17 of the Fair Labor Standards Act of 1938. (Act of June 25, 1938, 52 Stat. 1060, Ch. 676; 29 U. S. C. § 201, *et seq.*) to restrain the defendant, A. H. Phillips, Inc., from violating the provisions of §§ 15(a)(1), [fol. 24] 15(a) (2) and 15(a) (5) of the Act. The lower court adopted as its findings of fact those stipulated by the parties and concluded that certain employees of the defendant were exempt from the provisions of the Act, but

that its central office and warehouse employees were entitled to its benefits and issued its injunction accordingly. The defendant has appealed.

A. H. Phillips, Inc., is a Massachusetts corporation engaged in the acquisition, handling and distribution of various kinds of merchandise including canned goods, bottled goods, meats, vegetables, groceries, cigarettes, candy, coal and numerous other items to the extent of about $1,500,000 annually. It operates a chain store system with forty retail grocery stores in Massachusetts and nine in Connecticut and a central office and warehouse in Springfield, Massachusetts. The warehouse contains approximately 250,000 square feet of floor space and it has a receiving platform and railroad siding. It is maintained as a place to which the merchandise, about 80% of which comes from outside Massachusetts, is brought and from which it is distributed to its various retail stores. Its usual inventory runs between $175,000 and $200,000. A card index is kept for the purpose of maintaining a record of the supplies in the warehouse and revealing the amount of the stock of any particular commodity on hand. When it appears from the index that a particular item is low more goods are ordered to meet the prospective demand from the stores. Sometimes when the prices in the market are particularly favorable merchandise is bought irrespective of the index. The demand for supplies from the retail stores does not vary to any great extent and the requirements to meet such demand from week to week can be easily anticipated. Most of the merchandise is brought to the warehouse by rail and unloaded from the cars by the warehouse employees. The rest [fol. 25] of it comes in by common carrier trucks. A separate record of the business of each store is kept by the defendant and the individual retail store managers prepare requisitions for the merchandise required by their stores. These requisitions are subject to revision by the superintendents at the central office. Each week the merchandise is delivered from the warehouse to the stores to fill such orders and further deliveries are made as required.

The defendant employs its own trucks to make deliveries from the warehouse to its retail stores and the drivers operate interchangeably in such work within and without the State of Massachusetts. All goods handled by the defendant pass through the warehouse except bread, pastry

and milk, which are received directly by the retail stores from local sources. The central office negotiates the price and terms of sale of such articles and deliveries of them are made upon requisition of the store manager. The central office receives the invoices for these direct deliveries and makes the payment for them. The average turnover of the goods in the warehouse is about twelve times annually though the turnover of some things is more rapid. Ninety per cent of the goods is shipped from the warehouse in the original unbroken packages. The office employees check invoices, pay bills, and check direct deliveries to the stores. There is no record kept of the amount of time spent by such employees in connection with the order and receipt or shipment of out of state goods and their other duties, and interstate and intrastate shipments are handled indiscriminately by the receiving, shipping and billing clerks. Unloading of incoming shipments of merchandise from outside Massachusetts, and making up outgoing shipments to the retail stores in Connecticut are all part of the regular duties of the warehouse men and their helpers.

Nowhere does it appear in the case at bar that the appel- [fol. 26] lant denies that its warehouse and central office employees are engaged in interstate commerce. From the stipulated facts it is clear that these employees are engaged in work involving the receipt of merchandise from outside the state and in delivering merchandise from the warehouse to the retail stores in Connecticut. Further these goods come from points outside the state and after passing through the warehouse reach their final destination in the local retail stores. There is present that particularity in the continuity of their movement which shows that their entry in the warehouse was but a temporary pause in their interstate journey and they remain in interstate commerce until they are delivered at the retail stores. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

The fact that the warehouse and office employees are engaged in interstate commerce does not dispose of the case, for the appellant maintains that it is a retail establishment, the greater part of whose selling is in intrastate commerce, and that, therefore, its employees are exempted from the operation of the Act under § 13(a)(2). It insists that the word "establishment" means appellant's entire business organization. It finds support for its contention in *Walling*

v. *L. Wiemann Co.*, 138 F. (2d) 602 (C. C. A. 7th, 1943) cert. den. March 13, 1944, and *Allesandro et al.* v. *C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6th, 1943) and certain district court decisions. We do not agree. We think that the more persuasive authorities support the construction that the word "establishment" means a single place of business.

In *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778 (C. C. A. 7th 1942) the defendant operated three warehouses in Chicago from which it shipped goods to its ten department stores, some of which were outside the State of Illinois, and the court held as to the employees who distributed and delivered goods from the warehouses to the stores in Illinois [fol. 27] that they were engaged in intrastate commerce and not covered by the Act. But in speaking of § 13(a)(2) it said:[1]

"We think that such elimination of applicability was intended to include only ordinary retail stores, * * * and not a great establishment shipping goods out of the state to two of its important outlets."

Walling v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3rd, 1943) is a case involving a large chain store system operating eleven ware houses, seven bakeries, canneries, and purchasing offices, in various states and approximately twenty-three hundred retail stores. It claimed exemption under § 13(a)(2) on the ground that its entire enterprise was a retail establishment. The court said:

"From the standpoint of business integration, it might conceivably be assumed that this whole enterprise is an 'establishment'. However, it is quite another thing to say that it is a retail establishment when it engages in so many important operations other than retailing, even though the retail sale is the event from which the defendant's income is derived."

It gave a full and complete legislative history of the section and determined: "If defendant's interpretation were to be adopted, any manufacturer or wholesaler, no matter how

[1] This case may not be relied upon as authority on this point since the same circuit in the *Wiemann* case refused to follow this dictum, but we think it represents the better view.

large, would bring himself within the exemption through the establishment of his own retail outlets for sale to intrastate customers. The legislative policy of the Act as expressed in § 2 is not to be defeated by such artificial enlargement of two words used in an exemption clause".

The defendant in *Walling* v. *Block*, 139 F. (2) 268 (C. C. A. 9th, 1943) cert. den. March, 1944, owned and operated a chain of fourteen retail shoe stores in Washington, three in Oregon and two in Idaho, and a central office and warehouse [fol. 28] in Seattle. The court decided that the services rendered by the employees of the warehouse and central office were a mere extension to and integral part of the operation of each store in the group, and since the selling in no store was substantially interstate, the employees in question were excluded from coverage by § 13(a)(2). But we agree with the dissenting opinion which said that neither the central office and warehouse nor the appellee's business as a whole —of which the former is a distinct unit—can properly be defined as a "retail establishment" within the reach of the exception; that the central office and warehouse performs a quasi-wholesale and certainly a non-retail function; that the entire chain or business or industry is not an "establishment", although each link or outlet or store may properly be so termed. It also said that the legislative history indicates that Congress did not intend to exempt a multistate business like the defendant's from the operation of the Act.

When the bill which was finally enacted as the Fair Labor Standards Act of 1938 was before the House of Representatives, some of its members sought to exempt from the operation of the Act the local retail merchant. They were thinking of the small retailer whose business was carried on near state lines and some of which was in interstate commerce. An amendment was passed exempting "any retail industry the greater part of whose sales is in intrastate commerce" but when the measure was returned to the House from the Conference Committee this phraseology was changed. It is significant that the words "any retail industry" were omitted and the exemption was made to apply to employees "engaged in any retail establishment, the greater part of whose selling is in intrastate commerce". The word "industry" is defined in the Act to mean "the trade, business, industry, or branch thereof, or group of industries, in which

individuals are gainfully employed". If the word "estab-
[fol. 29] lishment" was considered to mean the same thing as "industry", there was no need to make the change in the amendment. Obviously, the word "establishment" was never meant to mean an entire organization.

The word "establishment" in legislative, administrative and commercial practice is treated as meaning a separate unit.[2]

Furthermore, since 1938, when Interpretative Bulletin No. 6 was issued down to its latest revision in 1941, the Administrator has consistently maintained this interpreta-

---

[2] Under the N. R. A. Codes of Fair Competition, Vol. V. pp. 5-15 (Wholesale Food and Grocery Trade), wholesale food and grocery establishment is defined as "any warehouse, office, or other establishment where a food and grocery wholesaler carried on business. Chain store warehouses and central offices were subject to the wholesale code and were not regarded as parts of retail establishments."

See also:

Under the Bureau of the Census, Instructions to Enumerators for business and manufactures, 1939. Sixteenth Decennial Census of the United States, p. 22.

Item 1 of Form 10, "Description of Establishment", requests information regarding (1) "Name of Establishment", (2) "Location of Establishment", (3) "Type of Establishment (such as central office, district office, chain store warehouse, etc.)", and (4) "Name of Organization or Company of which this Establishment is a Part."

Item 6, "Description of the organization or company of which this Establishment is a Part", requires a detailed specification of the number and types of different establishments operated by the company.

Executive Office of the President, Bureau of Budget, Standard Industrial Classification, 1940, Vol. 1, Part 1, p. iii, Vol. II, Part 2, pp. 41, 131. The central statistical board of the Executive Department of the United States excludes chain store warehouses from the category of retail establishments.

Chain Store Taxing Statutes of the various states where each unit is treated an an establishment, and the number of establishments is used as the measure of the tax.

[fol. 30] tion of the words "retail establishment" as evidenced by the language in paragraph 37, which states that:

"In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption. The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants, or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments."

Though no authorization for it appears in § 13(a)(2), this interpretation has some evidentiary value since it reveals "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making its parts work efficiently and smoothly while they are yet untried and new". *United States* v. *American Trucking Co.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

We do not believe this whole enterprise is a retail establishment within the meaning of the exemption. The central office and warehouse is a distinctly different type of place than the retail stores. No sales are made there and no direct contact is had with the customers. Each retail store is in itself an establishment, a place of business where the final disposition of the merchandise is made by sale to the customers. The central office and warehouse is also a separate establishment where the supervising managerial activities of the whole enterprise are carried on. They are distinct and separate units, though together they make up the entire organization. To be a successful chain store organization or system, it not only operates retail stores but it also buys in large quantities with a central point of receipt and distribution in the nature of a wholesaler. When such a system is developed and maintained it can no longer be considered a retail establishment as designated in § 13(a) [fol. 31] (2). Wholesalers must be in compliance with the Act. They cannot take advantage of the exemption. We believe Congress intended no such unfair discrimination. It is quite clear, as was said by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, *supra*, that the exemption in

§ 13(a)(2) was added to eliminate "those retailers located near the state lines and making some interstate sales".

The judgment of the District Court is affirmed.

On the same day, to wit, July 20, 1944, the following Judgment was entered:

JUDGMENT—July 20, 1944

This cause came on to be heard June 7, 1944, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, July 20, 1944, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court,

(S.) Arthur I. Charron, Clerk.

Thereafter, to wit, on August 5, 1944, mandate issued.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner.

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

JAMES F. EGAN,
Counsel for Petitioner.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Of Counsel.

INDEX

Table of Authorities Cited

Cases

Statutes

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit, rendered July 20, 1944, in the case between the above-named parties, docketed therein as Number 3979.

I

Summary and Short Statement of the Matter Involved

This is an action brought in the District Court of the United States for the District of Massachusetts by Thomas

W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor (for whom by stipulation of parties L. Metcalfe Walling was substituted by order of said District Court), against A. H. Phillips, Inc., petitioner herein. This action was brought to enjoin this petitioner from allegedly violating the provisions of Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chap. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, et seq.) (R. 2)

This petitioner is a Massachusetts corporation solely engaged in the business of selling at retail food and other grocery items. It operates forty-nine separate retail stores, forty of them in Massachusetts and nine in Connecticut, all within a radius of thirty-five miles of Springfield. Its office and warehouse are in one building in Springfield, Massachusetts. (R. 11)

The Massachusetts business constitutes 82% of its total volume; that of Connecticut, 18%. It does an annual business of about $1,500,000. The greater part of the time of its warehouse and office employees is devoted each week to work relating to goods which are to be sold through the Massachusetts stores. (R. 11, 12, 17)

In the District Court this petitioner filed an answer setting forth, among other defenses, the point raised in the Circuit Court of Appeals and which forms the basis of this petition, viz, that the Fair Labor Standards Act does not apply to petitioner nor to petitioner's employees, none of whom is subject to the provisions of Sections 6 and 7 of said Act under the exemptions provided in Section 13(a) (2) thereof.

Section 13(a) (2) of the Act provides as follows:

> "The provisions of section 6 and 7 (Minimum Wages, Maximum Hours) shall not apply with respect to * * * any employee engaged in any retail or service estab-

lishment the greater part of whose selling or servicing is in intrastate commerce." (Matter in parentheses is ours)

The facts were stipulated by the parties hereto and were adopted by the District Court as its findings of fact. (R. 11)

The District Court found that the petitioner is not a "retail establishment" within the meaning of said section 13 (a) (2), and concluded that the employees of the central office and warehouse are subject to the provisions of the Act and judgment accordingly was entered. (R. 18, 19, 20)

The Petitioner appealed to the Circuit Court of Appeals for the First Circuit which Court affirmed the judgment of the District Court. (R. 30)

II

The Jurisdiction of the United States Supreme Court

The date of the judgment sought to be reviewed is July 20, 1944.

The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the Judicial Code.

III

The Question Presented

Is the petitioner a retail establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act?

IV

Reasons Relied on for the Allowance of the Writ

The Circuit Court of Appeals for the First Circuit has rendered a judgment in this case in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court because the enforcement of the Fair Labor Standards Act carries serious civil and criminal consequences, and variations in its enforcement are productive of harm.

Wherefore it is respectfully submitted that the petition should be granted.

JAMES F. EGAN,
Attorney for Petitioner.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The facts upon which the petition is based appear in the petition and need not be stated here.

The opinion of the judge of the District Court is found in 50 Fed. Supp. 749 and is in the record at p. 11.

The opinion of the Circuit Court of Appeals was filed on July 20, 1944, has not yet been reported, and is in the record at p. 23.

Argument

It is the contention of the petitioner that it is a "retail establishment" within the meaning of the exemption in section 13(a) (2) of the Fair Labor Standards Act. In deciding to the contrary the District Court and the Circuit Court of Appeals for the First Circuit did not pass to a

consideration of the other requirements under said section 13(a) (2), and which requirements, it is contended, are shown by the record to be met by petitioner.

In its opinion in this case the Circuit Court of Appeals for the First Circuit recognizes that there is a conflict of decisions on the point raised by the petition. (R. 25)

> "• • • the appellant maintains that it is a retail establishment, the greater part of whose selling is in intrastate commerce, and that, therefore, its employees are exempted from the operation of the Act under Section 13(a) (2). It insists that the word 'establishment' means appellant's entire business organization. It finds support for its contention in Walling *v.* L. Wiemann Co., 138 F. (2d) 602 (C. C. A. 7th, 1943) cert. den. March 13, 1944, and Allesandro et al. *v.* C. F. Smith Co., 136 F. (2d) 75 (C. C. A. 6th, 1943) and certain district court decisions. We do not agree. We think that the more persuasive authorities support the construction that the word 'establishment' means a single place of business."

Again in its opinion the Circuit Court of Appeals for the First Circuit states its agreement with the dissenting opinion in the case of *Walling* vs. *Block*, 139 F. (2d) 268, C. C. A. (9th) cert. denied March 27, 1944. The Block case involved a chain of nineteen retail shoe stores operating in three states with an office and warehouse in Seattle. The majority opinion in the Block case held the office and warehouse employees excluded from coverage under Section 13(a) (2) of the Act and affirmed the dismissal by the District Court of the Administrator's suit.

Opinions of Circuit Courts of Appeals at variance with the opinion of the Circuit Court of Appeals for the First Circuit herein are:

> *Walling* v. *L. Wiemann Co.*, 138 F. (2nd) 602 (C. C. A. 7th, 1943) cert. den. March 13, 1944, wherein it was

held that the 16 separate retail stores and a separate general office and warehouse operated by a Wisconsin corporation in 5 cities in that state, together constitute a retail establishment within the meaning of Sec. 13(a) (2) of the Fair Labor Standards Act.

Allesandro et al. v. *C. F. Smith Co.*, 136 F. (2nd) 75 (C. C. A. 6th, 1943) wherein it was held that a grocery chain operating several hundred stores and several warehouses in Michigan was a retail establishment within the meaning of Sec. 13 (a) (2) of the Fair Labor Standards Act.

See also *Lonas* v. *National Linen Service Corp.*, 136 F. (2nd) 433 (C. C. A. 6th, 1943) cert. den. Nov. 8, 1943, wherein the words "service establishment", as used in Sec. 13(a) (2) of the Act, were held to include a linen supply concern with a main office in Atlanta and plants in various states.

Walling v. *Block*, 139 F. (2nd) 268 (C. C. A. 9th, 1943) cert. den. March 27, 1944, discussed supra.

This point has received considerable attention from District Courts, and opinions there at variance with the opinion of the Circuit Court of Appeals for the First Circuit herein are:

Walling v. *Fred Wolferman Inc.*, 54 F. Supp. 917;

Veazey Drug Co. v. *Fleming*, 42 F. Supp. 689;

White v. *Jacobs Drug Store*, 47 F. Supp. 298;

Duncan v. *Montgomery Ward Company*, 42 F. Supp. 879;

Walling v. *Wards Cut-Rate Drugs*, March 11, 1944, D. C. N. D. Texas.

Conclusion

The petitioner respectfully urges that the conflict in views upon the point here raised, and the serious consequences to

the petitioner and other persons engaged in businesses affected by these contrary views, merit the attention of the Supreme Court of the United States to the end that this conflict may be resolved.

Wherefore your petitioner prays that a writ of certiorari issue from this Court directed to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

JAMES F. EGAN,
Attorney for the Petitioner.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Of Counsel.

(4533)

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 608.

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

JOSEPH B. ELY,
FREDERICK M. KINGSBURY,
EDWARD T. COLLINS,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

Table of Authorities Cited.

CASES.

STATUTES.

TEXTBOOKS.

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 608.

A. H. PHILLIPS, INC.,
Petitioner,
v.
L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court (R. 11-20) is reported in 50 Fed. Supp. 749. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 23-30) is reporte din 144 Fed. 2d 102.

Jurisdiction.

A judgment of the Circuit Court of Appeals for the First Circuit, entered in an action brought under section

17 of the Fair Labor Standards Act of 1938 (chapter 676), 52 Stat. 1060; 29 U.S.C. sec. 201 *et seq.*, enjoined the petitioner from violating sections 15(a)1, 15(a)2, and 15(a)5 of the Act (R. 9-11).

Jurisdiction of this Court is invoked under section 240(a) of the Judicial Code. An order allowing certiorari was filed on December 4, 1944 (R. 30).

Statement of the Case.

The facts were stipulated and were adopted by the District Court as findings of fact (R. 11-17) and are summarized as follows:

The petitioner is a Massachusetts corporation having its office at Springfield, Massachusetts. It is engaged in the distribution and sale of grocery items. It operates forty-nine separate retail stores, forty of these in Massachusetts and nine in Connecticut, all within a radius of thirty-five miles of Springfield. The Massachusetts business constitutes eighty-two per cent of the total volume; that of Connecticut eighteen per cent.

The warehouse which serves all of these stores is located at Springfield, Massachusetts. The business office of the company is likewise located in Springfield, which performs all of the usual office work in connection with the entire business, except such sales records as originate in the stores themselves before transmittal to the office.

The petitioner does not engage in manufacturing or other activities not usual to a retail business.

Specification of Errors.

The Court erred in not finding and ruling that the stores, warehouse and office of the petitioner together constitute

a "retail establishment" within the meaning of the exemption in section 13(a)2 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U.S.C. sec. 201 *et seq.*).

Argument.

The stores, warehouse and office of A. H. Phillips, Inc., together constitute a "retail establishment." Its employees are thus exempt under section 13(a)2 of the Fair Labor Standards Act.

Section 13(a)2 of the Act provides as follows: "The provisions of section 6 and 7 [Minimum Wages, Maximum Hours] shall not apply with respect to . . . any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

As a general guide in the interpretation of this statute, the statement of Justice Frankfurter in *Kirschbaum Company* v. *Walling*, 316 U.S. 517, 522, is significant: "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

The words "retail establishment" are unambiguous. They afford no difficulty of interpretation. Any confusion as to the meaning of these words results from an interpretation by the Administrator of the Wage and Hour Division as

set forth in Interpretative Bulletin No. 6, issued December 1938, as amended in 1941.

This Bulletin states (paragraph 34): "The term 'establishment' is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Thus for example, a manufacturing company which has its own retail outlets, operates a number of separate retail and different types of establishments. Each physically separated place of business must be considered a separate establishment and the applicability of the exemption depends upon whether the particular establishment possesses the particular characteristics of a retail or service establishment."

Paragraph 37 states: "The question has been raised as to the scope of the term 'establishment' in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on a business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption. The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments."

While this Interpretative Bulletin issued by one experienced in the administration of the Act is entitled to some weight, it is not in any sense conclusive. As pointed out in *Walling* v. *Wiemann Company*, 138 Fed. 2d 602, 606-607; cert. den. U.S. Sup. Ct. March 13, 1944, the words of the statute are plain and unambiguous. The Administrator is assuming authority to define and delimit these plain and unambiguous words, particularly the word "establishment."

In *Addison* v. *Holly Hill Fruit Products* (decided June 5, 1944), 88 L. Ed. Advance Opinions, 1124, this Court, in discussing the Administrator's powers, stated:

> "The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. *Intermountain Rate Cases* (*United States* v. *Atchison, T. & S. F. R. Co.*), *234 U.S. 476, 58 L. Ed. 1408, 34 S. Ct. 986.* Again in the National Labor Relations Act, Congress gave the Board authority to take such action 'as will effectuate the policies of this Act.' (*July 5, 1935*) *Sec. 10(c), 49 Stat. 449, 454, c. 372, 29 USCA Sec. 160(c), 9 FCA title 29, Sec. 160(c).* The 'policies' of the Act were so broadly defined by Congress that the determination of 'the relation of remedy to policy is peculiarly a matter for administrative competence.' *Phelps Dodge Corp.* v. *National Labor Relations Bd. 313 US 177, 194, 85 L. Ed. 1271, 1283, 61 S. Ct. 845, 133 ALR 1217.* In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act like the National Labor Relations Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act, or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with

particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

"We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of goverment' but with part of a legislative code 'subject to continuous revision with the changing course of events.' *United States* v. *Classic, 313 US 299, 316, 85 L. Ed. 1368, 1378, 61 S. Ct. 1031.*

"Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference

to difficulties in administration." *Com.* v. *Grunseit (1943) 67 CLR (Austr) 58, 80.* For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense.

. . .

"The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *A. B. Kirschbaum Co. v. Walling, 316 US 517, 522, 86 L. Ed. 1638, 1646, 62 S. Ct. 1116.* To blur the distinctive functions of the legislative and judicial processes is not conductive to responsible legislation."

The word "establishment" comprehends within its definition physically separated units of the same business. Webster's International Dictionary, 2d Edition, defines "establishment" as "The place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; also an institution or place of business, with its fixtures and organized staff; as, a large establishment; a manufacturing establishment."

The Supreme Court of Michigan determined that nine separate plants operated by the Chrysler Corporation, and engaged in the manufacture of automobiles and trucks, which were located within a radius of eleven miles of the main plant in Detroit, Michigan, together constituted a single "establishment," since all of these units were syn-

chronized and employed by the corporation in the accomplishment of a common end.

Chrysler Corp. v. *Smith*, 297 Mich. 438; 135 A. L.R. 900.

The Supreme Court of Wisconsin reached the same result in determining that the Nash Kelvinator Corporation's plants in Milwaukee and Kenosha, located forty miles apart, were "just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other."

Spielmann v. *Industrial Commission*, 236 Wis. 240.

In each of the above cases a labor dispute actively in progress in one of the plants occasioned unemployment in the other plants. The question before the Michigan Court and the Wisconsin Court in determining the meaning of the word "establishment" as applied to an organization consisting of various units was almost identical with the question here presented.

The Administrator's definition has been criticized and disregarded in cases involving the interpretation of the Fair Labor Standards Act. The Circuit Court of Appeals for the Seventh Circuit determined that the sixteen separate retail stores and a separate general office and warehouse operated by a Wisconsin corporation in five cities in that state together constituted a retail establishment. This Court pointed out that the words of the statute are plain and unambiguous, and that since the language used is not fairly subject to more than one interpretation, "it cannot be altered in any manner except by Congressional action, certainly not by administrative or judicial legislation."

Walling v. *Wiemann Company, supra.*

The Circuit Court of Appeals for the Sixth Circuit held that a grocery chain operating several hundred stores and several warehouses in Michigan was a retail establishment, under the exemption of 13(a)2 of the Fair Labor Standards Act.

Allessandro v. *Smith Company*, 136 Fed. 2d 75.

The same conclusion was reached in cases before the District Courts. Twenty retail stores and a central warehouse operated by a corporation in Oklahoma were held to constitute a single retail establishment.

Veazey Drug Company v. *Fleming*, 42 Fed. Supp. 689.

See also *Duncan* v. *Montgomery Ward Company*, 42 Fed. Supp. 879.

White v. *Jacobs Drug Store*, 47 Fed. Supp. 298.

Lonas v. *National Linen Service Corp.*, 136 Fed. 2d 433; cert. den. U.S. Sup. Ct. November 8, 1943.

Walling v. *Ward's Cut-Rate Drugs*, March 11, 1944, D.C. N.D. Texas.

The decisions in the above cases were reached only after careful consideration of the words of the statute and with due deference to the interpretation of the Administrator as set forth in Bulletin No. 6. The Courts have consistently pointed out that the language is not fairly subject to more than one interpretation, and that the Administrator's interpretation that the term "retail establishment" does not include a warehouse and office serving physically separated stores of the same business organization is wrong.

The only decision which purports to uphold the Administrator's interpretation as applied to a chain of retail stores and central office and warehouse is found in the case

of *Walling* v. *Goldblatt Brothers*, 128 Fed. 2d 778. That Court reached the conclusion that a corporation which operated three warehouses in Chicago, distributing to ten separate department stores, seven in Chicago, one in Joliet, Illinois, one in Hammond, Indiana, and one in Gary, Indiana, did not come within the exemption of 13(a)2 of the Act. The Court was concerned mainly with the interstate commerce phase of the case and was not directly considering the meaning of the words "retail establishment." The Court used the following language: "Further, we think that such elimination of applicability was intended to include only *ordinary retail stores* . . . and not a great *establishment*, shipping goods out of the state to two of its important outlets." (Emphasis ours.)

It is significant to notice that the Court, when called upon to describe this entire organization, including its stores and warehouses, used the word "establishment." This is its ordinary meaning, as the Court's use of the same indicates.

This case can properly be distinguished on the ground that this "great establishment" engaged in substantial activities not necessary or usual to a retail business, that is, manufacture and processing of food, bakery products, meat compounds, blankets, draperies and other articles.

In fairness to that Court it must be assumed that it had these non-retail activities in mind in distinguishing that business organization as a "great establishment" from an "ordinary retail store." Otherwise the Court is reaching the illogical conclusion that, when Congress uses the word "establishment," it confines the term to the "ordinary retail store," whereas the Court itself uses the word "establishment" to describe the entire business organization. It is apparent that had Congress intended to limit the exemption to an ordinary retail store, it would have manifested such intent by the use of appropriate words.

If the Court did not have the non-retail activities in mind, its words must then be construed to mean that under the exemption of section 13(a)2 a retail establishment is exempt but a great retail establishment is not; that is, that Congress intended to limit the exemption to retailers of a certain size.

To read such an interpretation into two unambiguous words is, in the language of Justice Frankfurter in *Kirschbaum* v. *Walling, supra*, "retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Whether or not an establishment, great or small, is a "retail establishment" depends, not on the physical location of its units, but on the character of its business. It is a retail establishment if it is engaged in the business of a retailer, as distinguished from that of manufacturer, wholesaler or any other activity.

The Supreme Court has held that the exemption applies to "retailers": "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. . . . Moreover as we stated in *Kirschbaum Co.* v. *Walling, supra*, pp. 522-523, Congress did not exercise in this Act the full scope of the commerce power. . . . Since retailers are excluded by reason of these express provisions, it is thought that the inclusion of wholesalers should be implied. . . . It is quite clear that the exemption in § 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales. . . . And the exemption for retailers contained in § 13 (a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included."

Walling v. *Jacksonville Paper Company*, 317 U.S. 564, 570; 87 L. Ed. 460, 467.

The retail business is fundamentally purchasing goods in large lots and selling them in small lots. The actual sale of the goods, which is the final event in the retail business, is, however, but one of its four necessary functions. The business necessarily entails the purchase and storage of the goods, and the keeping of records of the business transactions.

The simplest illustration of a retail establishment is a corner grocery store, owned and operated entirely by one individual. If this person's business prospers and he hires one or more clerks to assist him, under the terms of the Fair Labor Standards Act, as interpreted by the Administrator, these employees are exempt. If his business expands to the extent that he can add more space and employ more clerks, he is still exempt. However, if at some point in the expansion of his business, he finds it convenient or necessary to rent storage space in a building across the street, the situation suddenly changes. At that point the Administrator determines that these employees in the separate storage space are not exempt, even though the same employees doing exactly the same work were exempt when the storeroom happened to be in the basement or in the back room of the store. Certainly Congress could have had no intention to exempt an employee working in the basement or back room of a store, and not exempt the same employee doing the same work in a room across the street. Such an interpretation by the Administrator is what the Courts have termed administrative legislation.

The Phillips Company, in the operation of its business, engages in no activities different from those of the smallest retail store. Its warehouse and central office function in conjunction with the retail sales outlets in the same manner as such functions are performed by any retail establishment. The sales outlets, the warehouses and office are as much an establishment as if all these activities were confined in one building.

In the District Court opinion, Judge Ford (R. p. 18), cites *Walling* v. *American Stores*, 133 Fed. 2d 840, stating: "That is a case whose facts are sufficiently similar to the present case to justify this Court in deciding it is decisive of the contentions made by the defendant." An analysis of the decision in that case demonstrates that the Circuit Court based its decision on certain activities performed by the American Stores Company which were not of a character usual or necessary to a retail business.

In addition to the usual functions of a retailer, the American Stores Company operated seven bakeries in three states, two canneries in Maryland, purchasing offices in Philadelphia, a coffee roasting plant, a laundry and garment shop, a printing and multigraphing shop, a laboratory and a bottling works, a large food processing and manufacturing plant, all in Philadelphia.

The Phillips Company engages in no activities other than those engaged in by the owner and operator of a single store; namely, buying of goods at wholesale, selling of the same at retail, and the record keeping and storage incidental thereto. There is therefore only a superficial resemblance between the Phillips Company and the American Stores organization.

At the time of Judge Ford's opinion the cases of *Walling* v. *Wiemann Company*, *supra*, and *Walling* v. *Block*, 139 Fed. 2d 268; cert. den. March 1944, had not been decided. The facts in those cases are almost identical with the case here under consideration. Both decisions distinguish the American Stores case, stating that the facts in that case were not analogous.

The decision in the American Stores case is clearly limited, as the opinion states, to a determination that a business organization which, in addition to the usual retail functions, engages in other activities, such as manufactur-

ing and processing, is not properly classed as a retail establishment.

It is significant that the Court did not find that the whole enterprise of the American Stores Company was not an establishment, stating (pp. 842-843): "From the standpoint of business integration, it might conceivably be assumed that this whole enterprise is an 'establishment.' However, it is quite another thing to say that it is a retail establishment when it engages in so many important operations other than retailing, even though the retail selling is the event from which the defendant's income is derived."

See also Note 11, p. 844: "Furthermore, even if the defendant's definition of 'establishment' were accepted, it would by no means follow that the American Stores Company performing the gamut of business operations it does, could properly be classified as a retail establishment."

This case can only be authority for the statement to which the decision is strictly limited; namely, that a "multi-state business structure engaged in the manufacturing and processing of food products, warehousing and distribution of food items to over 2,000 retail stores, is not a retail establishment."

In the American Stores case the Court went to some length in a discussion of the legislative history of the Fair Labor Standards Act. It has long been a settled principle of law that the Court should not resort to the history of proposed legislation or the debates preceding its passage, except to explain language of doubtful import. "Other information than that afforded by the words of the statute can be examined only to aid in the solution of an ambiguity. We can only interpret the words of a statute; we cannot speculate as to the probable intention of the legislature, apart from those words."

Allen v. *Commissioner of Corporations & Taxation*, 272 Mass. 502, 508.

The danger of predicating an opinion from isolated statements before a legislative committee on remarks by certain individuals in respect to the proposed amendments, as recited in the American Stores case, is apparent. There is no way of determining what effects, if any, were made by the reported statements or explanations upon the legislators who later voted on the bill.

The Court in the American Stores case prefaced its remarks concerning the Congressional debates, stating: "What the Congressmen meant by the use of that term 'retailer' is discernible from their questions and comments. Representative Dempsey, prior to the adoption of the amendment, asked whether the bill could 'in any way affect such business as that of the local groceryman, druggist, clothing store . . . operating solely within a state?' Representative Massingale offered an amendment and stated it was 'for the purpose of protecting what you would call the corner grocery store man, or the filling station man'. The House voted down all amendments to achieve this purpose upon the insistence of Representative Norton that the Bill amply covered the problem until Representative Cellar offered his amendment. It exempted 'any retail industry, the greater part of whose sales is in intrastate commerce'. This he argued, indicated 'in the clearest way *that retailing is exempted*'. If it were accepted, 'then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt.' The amendment was accepted." (Emphasis ours.)

The Court then points out that in the form finally passed the amendment contains the words "retail establishment" instead of "retail industry" and makes a distinction between the two, whereas it would follow from the Court's argument that Representatives Dempsey, Massingale, Norton, Cellar and all others voting in favor of the bill thought that the terms "retail industry" and "retail establishment" were synonymous.

The recital of the legislative history, and the inference drawn, were not necessary to the Court's decision. Such legislative history was argued to the Court in *Lonas v. National Linen Service Corp., supra*, wherein the Court stated (p. 434): "The exemption section being without ambiguity, we find no occasion to resort to extrinsic aids to construction, though it *may be said in passing that even though we were to consider the legislative history of the section as reviewed by each of the litigants, it would be far from clear that the Congress intended anything other than what it clearly expressed.*" (Emphasis ours.)

The American Stores case overlooks the very obvious fact that no Congressman voting on this legislation was unaware that in every section of the country there are numerous so-called "chain stores." The nature of their effect upon the economic life of the community has been under discussion upon numerous occasions. Their methods of operation and distribution of products are known to everyone. If Congress had intended to exclude these organizations from the exemption, they would have so stated. Clearly they intended the exemption to apply to persons engaged in the retail business, and intended no distinction as to the size or to the location of different units of the business.

The only issue before the Court is the interpretation of the unambiguous words used by Congress in the Fair Labor Standards Act. In all of the cases above cited where the same question of interpretation was directly before the Court, and where the organization claiming exemption, like the petitioner, was engaged solely in the retail business, as distinct from manufacturing or other activities, the Courts have been unanimously of the opinion that the exemption applied, and that the Administrator's interpretation was wrong.

There is a possible qualification to the above statement that in the Block case (*supra*) there was a dissenting opinion by Judge Garrecht (pp. 270-273). This opinion would indicate that the proper approach to a decision is not by way of an interpretation of the words of the statute. While the language is far from clear, it suggests that the application of a remedial statute should be extended and its applicability should be based on economic or moral grounds, rather than on the words of the statute itself.

He states (p. 271): "This case should be considered in its proper 'moral climate'. That moral climate is the public policy that dictated the passage of the statute that we are called upon to construe. . . . Being remedial in its character the Act should be construed 'in accordance with its obvious intent and purpose.'" It is submitted that the obvious intent of an exemption of retail establishments is found in the statute itself and that there is no occasion to explore the "moral climate."

The opinion concluded: "Courts should not be reluctant to apply the salutary and beneficent provisions of the Fair Labor Standards Act whenever this can be accomplished without doing violence to the language of the statute itself. For that law furnishes added proof that the American way is the way of humanitarianism and social betterment."

Such generalities can hardly be said to aid in a determination of what Congress meant by the use of two unambiguous words.

The interpretation that this dissenting opinion suggests, based as it is on the extension of a remedial statute to promote "humanitarianism and social betterment," disregards one important provision of the Act.

Section 16 of the Act provides as follows:

> "Sec. 16. (a) Any person who willfully violates any of the provisions of section 15, shall upon conviction

thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

This statute, though remedial in nature, also attaches severe criminal penalties. If an individual resists its application to his business which he considers to be a retail establishment, he does so at the peril of imprisonment or a substantial fine.

It is a well-established rule of construction that a statute penal in nature must be construed by giving words their fair meaning in accord with the evident intent of Congress.

United States v. *Raynor*, 302 U.S. 540, 552; 82 L. Ed. 413, 420.

United States v. *Hartwell*, 73 U.S. 385; 18 L. Ed. 830, 832.

Thus the petitioner, though not criminally charged in this action, is entitled to have the words "retail establishment" given their fair or usual meaning. A strained construction, for humanitarian or other reasons, in accordance with the Administrator's interpretation in Bulletin No. 6 would add judicial legislation to the administrative legislation already created.

Conclusion.

The language Congress used in the exemption in section 13(a)2 is plain and unambiguous. The petitioner's business organization is a retail establishment under the terms of the exemption. For the foregoing reasons the petitioner contends that the judgment below should be reversed.

Respectfully submitted,

JOSEPH B. ELY,

FREDERICK M. KINGSBURY,

EDWARD T. COLLINS,

Attorneys for Petitioner,

A. H. PHILLIPS, INC.

Address:

1387 Main Street,

Springfield, Mass.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR RESPONDENT

While we believe the decisions below are correct, we do not oppose the granting of certiorari because of the clear conflict among the decisions of several Circuit Courts of Appeals on the question involved and because of the importance of the question. This case involves the same question raised in *Walling* v. *Block,* 139 F. (2d) 268 (C. C. A. 9), in which certiorari was denied on

618441—44

March 27, 1944, 321 U. S. 788, namely, whether a chain store system's central warehouse and office, which performs the wholesale or quasi-wholesale functions for the system's retail stores, is a retail establishment within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201.

The decision below in the instant case is in direct conflict with the decision of the Ninth Circuit in the *Block* case. As pointed out by the Court below, its decision also conflicts with the reasoning of the Seventh Circuit's opinion in *Walling* v. *L. Wiemann Co.*, 138 F. (2d) 602, certiorari denied on March 13, 1944, 321 U. S. 785, and of the Sixth Circuit's opinion in *Allesandro* v. *C. F. Smith Co.*, 136 F. (2d) 75; but is in accord with the reasoning of the Third Circuit in *Walling* v. *American Stores Co.*, 133 F. (2d) 840, and with a dictum in the Seventh Circuit's opinion in *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, 783. The importance of the question was discussed in our petition for writ of certiorari in *Walling* v. *Block*. As there pointed out the question affects a large number of companies and their employees, since more than one-third of the 6,969 chain store organizations listed in the Census of Business, 1939, are reported to operate separate warehouses or separate central offices and

more than 100,000 employees are engaged in the warehouses and central offices affected.

For these reasons, we do not oppose the petition.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor of Labor.

NOVEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 11–20) is reported in 50 F. Supp. 749. The opinion of the Circuit Court of Appeals (R. 23–30) is reported in 144 F. (2d) 102.

JURISDICTION

The petition for certiorari was filed on October 18, 1944, and granted on December 4, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether employees employed in the central office and warehouse of a chain store system, through which goods move from outside of the State to 49 separate retail stores located in two States, are "engaged in a retail * * * establishment" and therefore exempt from the wage and hour provisions of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.* Section 13 (a), the interpretation of which is involved in this case, provides:

> SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

STATEMENT

This case arises upon a complaint (R. 1–6) filed by respondent in the District Court under Section 17 of the Fair Labor Standards Act, praying for an injunction directing petitioner to cease violations of the overtime and record keeping provisions of the Act (Secs. 7, 11). The facts were

stipulated and found by the District Court as stipulated (R. 11–17). They may be summarized as follows:

Petitioner is a chain store corporation dealing in canned fruits and vegetables, soap, flour and other staples, cigarettes, fresh fruits and vegetables, bread, milk, and other groceries (R. 11–12). It operates 49 retail stores, all of which are so located as to serve distinct trading areas (R. 11, 13). The stores are located in approximately 16 cities and towns scattered over a radius of 35 miles from Springfield, Massachusetts—40 in western Massachusetts and nine in Connecticut (R. 11, 13).

Quite apart from the retail stores, petitioner maintains a separate warehouse and office building, located in Springfield (R. 11, 13). No selling is done there; the warehouse is maintained as a point of concentration and distribution through which petitioner funnels merchandise on its way from scattered suppliers to the retail stores (R. 13–14). The warehouse maintains a large inventory, reflected in a card index showing the amount of each commodity on hand (R. 12). When the index shows that the inventory of a particular item is low, additional merchandise is ordered for subsequent shipment to one of the retail outlets for sale (R. 12). "There is a considerable amount of regularity in the demand from the retail stores for the particular commod-

ities, and the requirements to meet this demand from week to week can be anticipated" (R. 12).

About 80 percent of the merchandise passing through the warehouse is received from outside Massachusetts (R. 13). The warehouse is served by a direct railroad siding with a freight-receiving platform which accommodates eight freight cars (R. 12). Two-thirds of the merchandise arrives by rail, chiefly in carload lots, and is unloaded from the cars onto petitioner's unloading platform by its warehouse employees; the remainder comes in by truck (R. 13). From the warehouse a regular order is delivered once each week to each store and additional deliveries are made as required (R. 14). Merchandise is supplied on the basis of requisitions prepared by the individual store managers, subject to revision by one of three superintendents in the central office, each of whom has general supervision of a group of stores (R. 14, 16). A number of items of the stock is carried in the warehouse "turn-over" once a week; the average turnover is about twelve times annually (R. 15). Ninety percent of the merchandise is shipped from the warehouse to the stores in the original unbroken packages (R. 15). All petitioner's sales are made at the retail stores and deliveries to customers are made exclusively from the goods at the stores and not from the warehouse.

The employees involved in this action are engaged in the warehouse and central office; the

action is not concerned with employees in the retail stores. The office employees, among other duties, check invoices, pay bills and check direct deliveries to the stores. There is no segregation of their time between their services in connection with the ordering and receipt, or shipment, of out-of-state goods and their other duties (R. 15–16). The receiving, shipping, and billing clerks handle interstate and intrastate shipments indiscriminately (R. 16). The warehousemen and their helpers as a regular part of their duties unload incoming shipments from outside Massachusetts and make up outgoing shipments to Connecticut (R. 16).[1]

On these facts the District Court held that the warehouse and central office employees were engaged in interstate commerce and were covered by the Act (R. 18–19); and that they were not exempted from the wage and hour provisions by Section 13 (a) (2) since the central warehouse and office was not "a retail or service establishment" (R. 19–20). The Circuit Court of Appeals affirmed (R. 23, 30), holding: (1) that the employees in petitioner's central office and warehouse were engaged in interstate commerce within the meaning of the Act (R. 25); and (2) that the central office and warehouse is a distinct unit which "performs a quasi-wholesale and certainly

[1] Eighteen percent of the total sales by dollar volume is sold through the Connecticut stores from merchandise shipped through the Springfield warehouse (R. 12).

a non-retail function" and therefore is not a retail establishment within the exemption provided by Section 13 (a) (2) (R. 27). Only the latter point is argued by the petitioner here.

SUMMARY OF ARGUMENT

A

Under the normal meaning of the language of the Act the term "establishment" connotes "a place of business, or a building or location where business is conducted." While there are looser senses in which the term may sometimes be used, its primary commercial and mercantile connotation is one of *locus,* not of enterprise or organization. *Webster's New International Dictionary* (2d ed., 1934); 16 Cyc. 593; 30 C. J. S., p. 1234; *Black's Law Dictionary* (3d ed.). The context of the term in Section 13 (a) (2) and its use in another section (Section 12 (a)) of the Act support this conclusion. Petitioner's interpretation would assume, contrary to the statute, that the term "means one thing in one section and something else in another." See *Western Union Telegraph Co.* v. *Lenroot,* No. 49, this Term, decided January 8, 1945, slip opinion, p. 10.

B

Under settled business and governmental usage each unit of a chain store system is regarded as a separate establishment, and a chain store warehouse is regarded as falling outside the cate-

gory of "retail establishment." Prior to the enactment of the Fair Labor Standards Act, the term *"establishment"* was used in diverse regulatory and taxing statutes, in administrative regulation and business analyses to describe a place of business in contradistinction to an enterprise or organization made up of a number of integrated units. Under the N. R. A. Codes of Fair Competition, in the formulation of which the trade associations actively participated, and under the Bureau of Census Studies and Analyses, each physically segregated unit of a chain store organization is regarded as a distinct establishment.

Likewise in normal governmental and business practice, the warehouse and central office unit of a chain is not characterized as "retail." The functions performed in the warehouse and central office are essentially the same as wholesaling. Wholesalers are admittedly not within the exemption. To adopt petitioner's or the American Retail Federation's broad construction of the exemption would impute to Congress an intent to favor the chain's wholesaling units over the independent wholesaler, although their functions are scarcely distinguishable. Such a construction would run counter to the declared purpose of the Act to remove unfair competitive advantage gained by payment of substandard wages (Section 2 (a), cf. Section 8), and also would result in removing from the scope of the Act a

multitude of wholesaling and even manufacturing activities now being taken over by chain systems—activities which Congress certainly did not intend to exempt. It is not to be presumed, in the absence of evidence of such a purpose, that Congress intended thus to favor the chain over the independent wholesaler, or to effect so serious a curtailment of the application of the Act. There is no evidence of such a purpose in the legislative history.

C

The legislative history of Section 13 (a) (2) shows that Congress used the words "retail establishment" in their accepted sense and intended the exemption to be one for the protection of the grocery store, the clothing store, the shoe store, and similar local merchants situated near State lines, and not for the advantage of the great chain store warehouses competing with non-exempt wholesalers in the interstate distribution of goods. The deliberate legislative substitution of the word "establishment" for the word "industry" is unmistakable evidence of the legislative intent to restrict the exemption.

D

If the meaning and purpose of the exemption were otherwise uncertain, the consistent administrative interpretation should be decisive. Plainly, the Administrator's interpretation is a permissible

and reasonable construction of the statutory language. His interpretation has been consistently maintained, and represents the result of thorough consideration of the pertinent factors.

ARGUMENT

PETITIONER'S WAREHOUSE AND CENTRAL OFFICE EMPLOYEES ARE NOT ENGAGED "IN A RETAIL ESTABLISHMENT"

The petitioner does not deny that its warehouse and central office employees are engaged in interstate commerce within the meaning of the Act. All the employees participate either in the receipt of goods from outside Massachusetts, and are therefore engaged in "buying and receiving across State lines" (*Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5), affirmed, 317 U. S. 564), or in making interstate shipments to Connecticut (R. 16).

The question here, then, is solely whether petitioner's warehouse and central office employees are employed "in a retail establishment" within the meaning of the exemption provision in Section 13 (a) (2). At the outset, therefore, it does not seem amiss to emphasize that an exemption from remedial legislation is to be narrowly construed and extended only to those "plainly within its terms." *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Piedmont & Northern Ry.* v. *Interstate Commerce Comm.*, 286 U. S. 299, 311–312;

Spokane & Inland R. R. v. *United States*, 241 U. S. 344, 350.[2]

A. THE NORMAL MEANING OF THE TERM "ESTABLISHMENT" IS A PLACE OF BUSINESS AND NOT A MULTI-UNIT CORPORATION OR BUSINESS ENTERPRISE

Section 13 (a) (2) provides:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

Petitioner's basic contention is that its entire enterprise or organization taken as a whole constitutes a single "retail establishment" (br., p. 3). It argues that the words "retail establishment" are unambiguous and takes issue with the Administrator's interpretation that "establishment" as used in Section 13 (a) (2) refers to each distinct place of business rather than to an enterprise or an organization. We submit that in ordinary, natural usage, the word "establishment" signifies a place and its primary commercial meaning is a "place of business." See *Webster's New Inter-*

[2] For cases applying this principle to exemptions from the Fair Labor Standards Act see *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1); *Schmidtke* v. *Conesa*, 141 F. (2d) 633 (C. C. A. 1); *Calaf* v. *Gonzalez*, 127 F. (2d) 934, 937 (C. C. A. 1); *Conley* v. *Valley Motor Transit Co.*, 139 F. (2d) 692 (C. C. A. 6); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 106 (C. C. A. 9); *Joseph* v. *Ray*, 139 F. (2d) 409, 410 (C. C. A. 10).

national Dictionary (2d ed., 1934); 16 Cyc. 593; 30 C. J. S., p. 1234; *Black's Law Dictionary* (3d ed.). There are looser senses in which the term is used, but the ordinary mercantile connotation seems clearly to be one of *locus* and not of organization or enterprise.

That the term is used in Section 13 (a) (2) in the sense of a distinct place of business seems evident from its context in that section, as well as from its use in another section of the Act. Section 13 (a) (2) speaks of employees "engaged *in* a retail or service *establishment*" and not of employees *of* a retail *enterprise* or employed *by* a retail *organization*. Although the use of the word "in" might not be of any significance standing alone, it is significant when read in connection with Section 12 (a) of the Act, which unmistakably uses the word "establishment" in the sense of a place of business. Section 12 (a) prohibits the shipment in interstate commerce of "goods produced *in an establishment situated* in the United States *in or about which* within thirty days prior to the removal of such goods *therefrom* any oppressive child labor has been employed". The italicized words pertain to place and not to organization; "in or about which" can refer only to each place where business is carried on; an enterprise does business in the United States and a corporation is domiciled there, but neither is "situated"; and surely goods are not produced *"in"* an enterprise or corporation and are not removed *"therefrom."* In Sec-

tion 12 (a), therefore, "establishment" must mean "place of business" and it is not to be assumed that it "means one thing in one section and something else in another." See *Western Union Telegraph Co.* v. *Lenroot,* No. 49, this Term, decided January 8, 1945, slip opinion, p. 10; *United States v. Cooper Corp.,* 312 U. S. 600, 607.

B. UNDER COMMON BUSINESS AND GOVERNMENTAL USAGE EACH UNIT OF A CHAIN STORE SYSTEM IS A SEPARATE "ESTABLISHMENT" AND A CHAIN STORE WAREHOUSE IS NOT A "RETAIL ESTABLISHMENT"

It is not necessary, however, to rely solely on the normal meaning of "establishment" or on its usage elsewhere in the Act. The terms "establishment" and "retail" are not novel in legal, governmental, and business usage. According to such usage, each distinct physical unit of petitioner's organization is a separate establishment; petitioner's retail grocery stores where the public may trade are typical "retail establishments"; the building in which the central office and warehouse are located, taken by itself, also constitutes an "establishment", but it is not a *"retail* establishment" within the meaning of the Act, because it engages in wholesaling functions for the stores and does not sell at retail to the consuming public.

1. *Governmental and business usage of term "establishment"*

Prior to the Fair Labor Standards Act "establishment" was commonly found in diverse regu-

latory and taxing statutes, in administrative regulations and business analyses. It was used to describe a place of business in contradistinction to an enterprise or organization made up of a number of integrated units. Applied to a chain store system, "establishment" described each unit of the chain. It cannot be assumed that Congress was ignorant of this established practice--much of it under N. R. A.—and when Congress used the term, it must have done so with the intention that it be given this accepted governmental and commercial meaning.

In such varied fields of business legislation as taxation,[3] fire prevention, child labor, employer's

---

[3] See Ala. Code (1940), title 51, sec. 620–629; Colo. Stat. Ann. (1935), vol. 4, c. 161, secs. 1–11; Del. Rev. Code, (1935), c. 6, sec. 145, p. 59; Fla. Stat. Ann. (1941) secs. 204.01–204.16; Ga. Laws (1937), no. 355, secs. 1–13, p. 75; Idaho Sess. Laws (1933), c. 113, secs. 1–15; Ind. Stat. Ann. (Burns, 1933), secs. 42–301—42–313; Iowa Code (1939), c. 329.5, secs. 6943.126–6943.141; Ky. Rev. Stat. (1944), secs. 137.200–137.250; La. Gen. Stat. Ann. (1939), vol. 6, secs. 8664–8674; Md. Code Ann. (1939), vol. 2, art. 56, sec. 65; Mich. Comp. Laws (Mason Cum. Supp. 1940), vol. 5, c. 186A, secs. 9757–1—9757–13; Minn. Stat. (1941), vol. 1, secs. 328.01–328.16; Miss. Gen. Laws (1936), c. 157, secs. 1–9; 1939 Supp. to Mont. Rev. Code 1935, c. 221, secs. 2428–2428.14; N. C. Pub. Laws (1939), c. 158, sec. 162; S. C. Code (1942), vol. 2, sec. 2556; S. D. Cole (1939), vol. 3, c. 57.34, secs. 57.3401–57.3407; Tex. Stat. (Vernon, 1936), Penal Code vol. 2, art. 1111d, secs. 1–11; W. Va. Acts (reg. sess., 1933), c. 36, secs. 1–12; Wis. Spec. Sess. Laws (1937), c. 12, expired July 1, 1939. Compare *Great Atlantic & Pacific Tea Co. v. Morrissett*, 58 F. (2d) 991 (E. D. Va.), affirmed, 284 U. S. 584.

liability, and hours of employment,[4] legislatures and courts alike, with rare exceptions,[5] speak of an "establishment" to denote a "place of business," and have treated each physical unit of an organization as a distinct "establishment." Chain store tax statutes, perhaps, are the most familiar precedents in this field. Without exception they treat every chain store organization as comprised of many "establishments." They have not re-

[4] See 16 ALR 537 and 96 ALR 1351 for compilations of cases under these statutes, including many turning on the meaning of "establishment." Under these statutes courts have indicated clearly that the "establishment" contemplated is a physical *place* where business is carried on. See *Atlantic Ice & Coal Co.* v. *Maxwell*, 210 N. C. 723, 188 S. E. 381, 383; *Truman* v. *Kansas City, M. & O. R. Co.*, 98 Kans. 761, 161 Pac. 587, 588–589; *Lilley* v. *Eberhardt*, 37 S. W. (2d) 599, 600–601 (Sup. Ct. Mo.); *Baltimore & O. S. W. R. R. Co.* v. *Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239; *McNabb* v. *Clear Springs Water Co.*, 239 Pa. 502, 87 Atl. 55; *Williams Bros. Mfg. Co.* v. *Naubuc Fire District*, 92 Conn. 672, 104 Atl. 245; *Barfoot* v. *White Star Line*, 170 Mich. 349, 136 N. W. 437, 441; *Detroit Edison Co.* v. *Secretary of State*, 281 Mich. 428, 275 N. W. 196.

[5] Petitioner cites two instances, *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.*, 236 Wisc. 240, 295 N. W. 1 (br., p. 8). We have found no other exceptions to the accepted usage stated above. Both of the above cases were decided in 1940, that is, subsequent to the enactment of the Fair Labor Standards Act. Also, even if it be assumed that the broad interpretation of the term "establishment" was warranted in those cases (but see the strong dissenting opinon in the *Chrysler* case, 297 Mich., at 454–476), the policy of the unemployment compensation statutes involved in those cases, and the context of the word "establishment" in those statutes are quite different from the statutory policy and context of the term here.

garded as one "establishment" the business of an entire retail chain. Indeed, many statutes used the number of "establishments" as the measure of the tax.[6]

Similarly, under N. R. A. Codes of Fair Competition, prepared by committees from the industries concerned, the word "establishment" was used in the sense of a "place of business," and warehouses and other nonretail selling units of retail chains were treated as distinct from the retail outlets. Both the Code for the Retail Food and Grocery Trade and the Code for the Wholesale Food and Grocery Trade used the term "establishment" in the sense of the physical place where the business was carried on, and not in the sense of a whole enterprise. The Retail Food and Grocery Trade Code defines the term as "any store, department of a store, shop, stand, *or other place where*" the retailer carries on business. [Italics supplied.][7] The Wholesale Food and Grocery Trade Code defines the term "establishment" as "any warehouse, office, *or any other establishment where*" a wholesaler carries on busi-

---

[6] See n. 3, p. 13, *supra*.

[7] The full definition reads as follows: "The term 'retail food and grocery establishment' or 'establishment' as used herein shall mean any store, department of a store, shop, stand, or other place where a food or grocery retailer carries on business other than those places where the principal business is the selling at retail of products not included within the definition of retail food and grocery trade." See *N. R. A. Codes of Fair Competition*, Vol. IV, p. 460–461.

ness. [Italics supplied.][8] While the retail stores of a chain system were subject to the Retail Food and Grocery Code, the chain store warehouses and central offices were treated as separate establishments subject to the Wholesale Code, and were not regarded as parts of a "retail establishment."[9]

---

[8] The definition in full reads as follows: "The term 'wholesale food and grocery establishment' or 'establishment' as used herein shall mean any warehouse, office, or department of any other establishment where a food and grocery wholesaler carries on business, other than those places where the principal business is the selling of merchandise at retail or the selling at wholesale of products not included within the definition of wholesale food and grocery trade." (*Id.*), Vol. V, pp. 5–6.

[9] The retail and wholesale food and grocery codes were under a common Code Authority, the National Food and Grocery Distributors' Code Authority (Vol. IV, p. 470, Vol. V, pp. 13–14), which held that chain store warehouses were governed by the wholesale, rather than the retail code. See N. R. A. files on the Code of Fair Competition for the Wholesale Food and Grocery Industry [Code No. 196—Classification], Memorandum from Irwin S. Moise, Acting Deputy Administrator to Ruth E. Rubin, Acting Trade Practice Compliance Officer, dated September 5, 1934, "Please be advised that employees working in warehouses for chain grocery stores, whose business is the wholesaling and distributing of merchandise to retail outlets, are governed by the Wholesale Food and Grocery Code." Also see memoranda from F. B. Northrup, Assistant Deputy Administrator to Eugene C. Mahoney, State N. R. A. Compliance Director, dated December 8, 1934 to Harold B. Saler, dated January 8, 1935, and to F. E. Morris, State Compliance Officer, dated January 5, 1935. This last memorandum states that "Whereas, such a warehouse does not make sales to retailers in the ordinary sense of a wholesaler, yet the wholesale function is being performed and under the definition of a food and grocery wholesaler, it would appear clear that all its operations should be governed

The Bureau of the Census also has adopted the "establishment" as its basic unit for compiling official census reports on manufacturing, wholesaling, and retailing. The term is defined as "the place where the business is conducted." [10] A multi-unit company is required to submit a separate report for each of its "establishments," and, for this purpose, different forms are furnished. [11] Each store, warehouse, manufacturing or processing plant, or other physically segregated unit of a chain store organization is treated as a separate "establishment." [12]

---

by the Wholesale Code." And see N. R. A. History of the Code of Fair Competition for the Wholesale Food and Grocery Trade (Code History 196) Oct. 27, 1936, pp. 83–84.

[10] See *Instructions to Enumerators for Business and Manufactures* (1939), Sixteenth Decennial Census of the United States, p. 22.

[11] *Id.*, pp. 90–116. There are numerous examples of the distinction which the Census draws between "establishment" and "organization" or "company." See, e. g., Census Forms (1939), Census of Business: 1939, *Retail Trade*, Vol. I, p. 876, Form 21 (Retail Schedule); Census of Business: *Wholesale Trade*, 1939, Vol II, pp. 1050–1057, Form 31 (Wholesale Schedule), Form 32 (Petroleum Bulk Tank Stations), Form 33 (Agents and Brokers), Form 34 (Farm Products).

Item 1, Census Form 10 (1939), used by multi-unit organizations to report data concerning central administrative offices, chain store warehouses, physically segregated central garages, etc., requested information regarding (1) "Name of Establishment," (2) "Location of Establishment," (3) "Type of Establishment (such as central office, district office, chain store warehouse, etc.)," and (4) "Name of Organization or Company of which this Establishment is a Part."

[12] The Retail Federation's brief states that the fact that the Census treats each physically segregated part of a chain enterprise as a separate establishment is not significant since the

Under legislative, governmental, and business usage, therefore, petitioner's enterprise is not a single "establishment." Each of the stores and the warehouse and central office are distinct establish-

---

Bureau of Census "treats the warehouse of each type of retailer, as a 'retail establishment'" (br., p. 23). This is not an accurate statement. While it is true that in the 1935 and 1939 Census of Business, the chain store warehouses and central office buildings were included under the general classification "Retail Distribution," and "Retail Trade" respectively, and were analyzed under the general heading "Retail Chains," this clearly appears to have been done only because of the relationship of the retail chains to their warehouses and central offices and not because the latter, taken alone, were regarded as retail in character. Census of Business: 1935, *Retail Distribution*, Vol. I, p. 26–27, 1939 Census of Business, *Retail Trade*, Vol. I, p. 31–33. See also pages 183–184. This is evident from the census prior to 1935, when the chain store warehouses and central offices were included under the classification "Wholesale Distribution" (Census of Business 1933, pp. 5, 30), which was described as covering "the whole range of organizations engaged in wholesale trade and which perform wholesale functions, including * * * chain store warehouses * * *" (p. 5).

The reasons for this classification were carefully stated and are peculiarly significant to the issue here. Chain store warehouses were defined as "establishments maintained by retail chains as distributing stations used to supply their stores with merchandise. In some respects they are similar in operations to establishments of wholesale merchants, and are, in reality, more than mere warehouses. They maintain stocks, break bulk, and deliver and bill the merchandise to retail outlets" (*Id.*, p. 30).

No explanation is given for the transfer in the 1935 and 1939 census of the data on chain store warehouses to the Retail Trade classification. However, it is evident that the transfer was not occasioned by any change of opinion regarding the wholesale character of the functions of such warehouses. They are still analyzed as a type of establishment

ments and the character of each is to be separately determined from its particular functions.

2. *Governmental and business usage of term "retail"*

Likewise, in normal governmental and business practice, petitioner's warehouse and central office building is not a *retail* establishment. Petitioner argues (br., p. 12) that the employee in the stock room or basement storeroom of a retail store is exempt, and that therefore the Administrator is guilty of "administrative legislation" in construing the exemption granted by Section 13 (a) (2) as inapplicable to its large separate warehouse which handles all the purchasing and distributing of merchandise to 49 retail stores. But the distinction is clear. And it is not merely that the stock room in a retail store is within the literal language of the exemption—that it is physically *in* the establishment where the retail sales are made. The functions performed in the stock room and in the separate warehouse differ in kind. The distinction has been explained convincingly from a practical business point of view: "*Some agency must provide the machinery to move all merchandise from the producer to the retailer. Regardless of what this function is called, it is essentially the same as wholesaling.*

separate and distinct from the retail stores, and they report the distribution to their own stores as "Reported Sales (*at wholesale*)." [Emphasis supplied.] See 1939 Census, Tables 21 (A) and 21 (B), pp. 183–184.

* * * Chain stores, once they assume enough importance to justify a warehouse, are engaged in wholesaling as well as retailing. Whatever goods are handled at retail outlets must be bought in quantity, handled in the warehouse and alloted to the individual stores in much the same way that wholesalers would serve the independent dealers." [Italics are the author's.] *Chamber of Commerce of the United States, National Wholesale Conference, Report of Committee 1, Wholesalers' Functions and Services, 1929* pp. 13–14.[13]

The business fact thus stated is illustrated by the operations of petitioner's warehouse. The warehouse receives goods in carload lots delivered at its freight platform from a direct railroad siding (R. 12–13); the warehouse employees divide the merchandise and distribute it to the stores in large quantities—a week's supply for each store (R. 14)—where it is sold to the consumer in small lots and at retail. The warehouse is the intermediate distribu-

---

[13] See also, *Does Distribution Cost Too Much?* 20th Century Fund (1939), pp. 100–110 (particularly table 14, p. 106), 171–209, 345–346 (chain store warehouses classified as intermediary trade, together with independent wholesalers and manufacturers of sales branches; retailing is the last step in the chain of distribution and is limited to the transfer of commodities from the retail store to the household consumer); Nystrom, *Chair Stores, Domestic Distribution Department, Chamber of Commerce of the United States*, 1930, p. 16; Beckman and Nolen, *The Chain Store Problem*, 1938, pp. 7–9, 48–49; see U. S. Bureau of the Census, *Census of American Business*, 1933, *Wholesale Distribution*, vol. 1, p. 30.

tive link, like the wholesaler it replaced, in the journey from grower or manufacturer to ultimate consumer. The employees in the "billing department" make out invoices to each store for the shipments it receives (R. 16). Except for the fact that it does not make technical "sales," petitioner's warehouse is a wholesale establishment.[14] Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

Petitioner's argument that a chain store warehouse is so closely akin to the stock room of a single store as to require similar treatment has been rejected by courts as well as by experts on distribution. In a decision upholding a statute taxing chain store "distributing houses" at the same rate as wholesale houses (*Great Atlantic & Pacific Tea Co.* v. *Morrissett*, 58 F. (2d) 991, 993 (E. D. Va.), affirmed without opinion, 284 U. S. 584), a three judge statutory court said:

---

[14] This is obviously not simply a case where a single retail store has found it "convenient or necessary to rent storage space in a building across the street" (cf. petitioner's br., p. 12). To regard each physically separated place of business as a separate establishment does not necessarily mean that the place of business may not include more than one building if the buildings are situated in the same location and are in fact operated as a single physical unit or place of business. Where, as here, however, there is a clear physical and geographical separation of the buildings, no difficult problem of drawing lines or distinctions is presented. The warehouse and central office building here are so situated as to remove any doubt that it is a place of business separate from the retail stores.

629428—45——4

> It is contended that there is no real difference between complainant's distributing house and a place maintained by a large department store from which goods are supplied to the various departments of one store, and that to tax in the one case and not the other is discriminatory. We cannot agree with this contention. The one is a place corresponding to a wholesale house, the other simply a storage house, and to classify them differently for purposes of taxation is well within the functions of the taxing power of the state.

The report of the National Wholesale Conference quoted above (pp. 19–20) and this opinion reflect a general understanding. A special committee of the Bureau of the Budget, set up to standardize industrial data of all federal and state agencies and other research groups, has established a standard industrial classification which is designed to conform to the existing structure of American industry. This analysis excludes chain store warehouses from the category of retail establishments. See Executive Office of the President, Bureau of Budget, *Standard Industrial Classification Manual,* 1941, Vol. I, p. iii; Vol. II, p. 60. Finally, under the N. R. A. codes adopted by the very industry of which petitioner is a member, chain store warehouses were treated as wholesale establishments distinct from the retail outlets where the goods were sold, and as subject to the wholesale, not the retail, code.[15]

[15] See *supra*, p. 16.

The American Retail Federation's brief amicus devotes considerable space (br., pp. 16–21) to the argument that employees of chain systems like petitioners "are commonly treated and considered as one labor group" and classified as a retail group (br. p. 16, et seq.). In support of this contention they cite (a) the practices under state and federal collective bargaining statutes, (b) administrative practice with respect to state minimum wage orders, (c) government job classification studies for the Retail Trade, and (d) the composition of labor unions. The short answer to reliance upon these sources is that none of them involves the meaning of the terms "establishment" or "retail establishment."

(a) The wholly irrelevant character of the collective bargaining statutes is evident on the face of Section 9 (b) of the National Labor Relations Act. Under that section the Board is given broad authority to determine whether "the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" (49 Stat. 449, 453, 29 U. S. C. Secs. 151, 159).[16] Obviously the exemp-

[16] "The Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate." *Pittsburgh Plate Glass Co.* v. *Na-*

tion provided by Section 13 (a) (2) of the Fair Labor Standards Act was not intended to have such breadth.

(b) State minimum wage orders are likewise irrelevant, since the statutes authorizing such wage orders expressly provide for classification by "occupation," which is almost uniformly defined broadly to mean "industry, trade or business or branch thereof or class of work therein." [17]

(c) The *Job Descriptions for the Retail Trade* (see br. amicus, p. 18) throw no light on the meaning of the term "retail establishment." Jobs of the character described in these studies are not limited *exclusively* to the retail trade and because there is a similarity in the nature of employees' jobs does not mean they work in the same establishment or that the establishments in which they work perform the same functions. For example, shipping clerks, mail order clerks, stock clerks,

---

tional Labor Relations Board, 313 U. S. 146, 152. The Board has even certified all workers, who perform work of a particular kind, of several employers as the appropriate bargaining unit. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401.

[17] See for example, Illinois Revised Statutes, c. 48, secs. 198–216; New York Consolidated Laws (McKinney's), Labor Law, secs. 550–566. Oklahoma Statutes (1941), ti. 40, secs. 261–284; Mass. Gen. Laws (Terc. ed.), c. 151, secs. 1–15; Rhode Island Public Laws (1935–1936), c. 2289, p. 613; Pennsylvania Statutes (Purdon), ti. 43, secs. 331a–331q. See also the comprehensive analyses on *State Minimum-Wage Laws and Orders*, U. S. Department of Labor, Women's Bureau, Bulletins 167 (1939–1940) and 191 (1942).

typists, stenographers, may be found in the wholesaling and manufacturing trades as well as in the retail trade. Moreover, many of the jobs described which are characteristic of a retail establishment (sales clerks, will-call clerks, lost and found clerks, personal service clerks, complaint desk clerks, floor managers, and credit managers, etc., see *Job Descriptions, supra,* Vols. I and III) are not to be found in a chain store warehouse, like petitioner's, and thus indicate the nonretail rather than the retail character of such warehouses.

(d) The reliance upon labor union organization (br. amicus, p. 19) is equally misplaced in view of the nature of the considerations and influences which determine labor union organization. Moreover the Retail Federation's inference that the American Federation of Labor's Retail Clerks' International Protective Association includes employees in chain store warehouses (see br. amicus, p. 19), is erroneous. We are advised by the president of the American Federation of Labor that the jurisdiction of the Retail Clerks' International Protective Association covers retail clerks employed in retail stores and does not cover employees of wholesale warehouses including chain store warehouses. The employees of these warehouses come under the jurisdiction of a different union—the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Since the C. I. O. organizes wholesale and retail employees in one union, its practice throws

no light upon the character of chain warehouses as either wholesale or retail.

3. *The policy of the Act as a whole strongly supports the accepted governmental and business meaning of the words*

There is a normal presumption that Congress uses words in regulatory legislation with their accepted governmental and business meaning. Here the circumstances are compelling. To accept petitioner's contention that under this Act an "establishment" is an enterprise or corporation, and that a chain store warehouse performing wholesale functions is part of a "retail establishment," would impute to Congress an intent to disregard settled understanding and would upset existing business practices in a way which Congress surely intended to avoid.

Section 2 (a) of the Act declares the purpose to remove unfair competitive advantage gained by payment of substandard wages and employment for long hours without overtime pay. Cf. *United States* v. *Darby,* 312 U. S. 100. Section 8 shows the desire of Congress that minimum wage regulation should not give competitive advantage to any group. To disregard the accepted meaning of "retail establishment" in interpreting Section 13 (a) (2), would set these policies at naught by including chain store warehouses within the exemption although their competitors, the wholesalers, are subjected to the requirements of the

Act.[18] In many cases the two organizations are scarcely distinguishable. As indicated by the quotation from the National Wholesale Conference Report, *supra*, pp. 19–20, and by the N. R. A. classification (*supra*, p. 9) food and grocery chain store warehouses perform essentially the same functions as those performed by the independent wholesale grocer. Many chains formerly relied in whole or part upon independent wholesalers for their goods and did not operate their own warehouses. Much attention in recent years has been focused upon the assumption by chains of the distributing functions of independent wholesalers and upon the problems created by the great competitive advantages the chain warehouse has over the independent wholesaler.[19] It has been recognized that the independent wholesaler has felt the impact of the advantages inherent in chain warehouses, which have no selling problem, no credit problem, no loss from bad debts, and

---

[18] Various attempts, both before the enactment of the Act and subsequently, to secure exemption for employees of "wlrolesalers," "handlers" and "distributors," have failed. (83 Cong. Rec. 7422 (1938); H. R. 4631, 76th Cong., 1st sess. (1939); see S. 3048, H. R. 8323, 76th Cong., 3d sess. (1940); S. 3180, H. R. 8045, 76th Cong., 3d sess. (1940); 86 Cong. Rec. 5267 (1940); *id.* at 5457; *id.* at 5474.)

[19] *Does Distribution Cost Too Much?*, 20th Century Fund (1939) pp. 105–106, 176,181, 345–346; Beckman and Nolen, *The Chain Store Problem*, pp. 8, 42 ff.; Beckman and Engel, *Wholesaling*, pp. 255–256; Schmalz, Carl N., Harvard Business Review, Vol. IX, No. 4, July 1931, *Independent Stores versus Chains in the Grocery Field*, p. 431.

greater efficiency of operation because of their integration with the retail outlets.

The exemption provided by Section 13 (a) (2) admittedly does not apply to the warehouses operated by independent wholesalers. Since labor costs are a considerable part of the wholesalers' total operating cost (56.4 percent),[20] the extension of the Section 13 (a) (2) exemption to chain store warehouses would only increase and aggravate the competitive disparity between the chain warehouse and the independent wholesaler.[21] In view of the prevalent public policy, evinced in state and federal legislation, to curb the crushing competition of the chain organizations,[22] it cannot be supposed, in the absence of evidence of such a purpose, that Congress intended to favor the chain over the independent wholesaler, and to increase the

---

[20] U. S. Bureau of the Census, Census of Business: 1935, *Wholesale Distribution*, vol. II, table 1, p. XIX.

[21] Although on the record in the instant case, it does not appear that petitioner's warehouse does any wholesale business with independent retailers, many chain store warehouses compete directly with independent wholesalers by performing the wholesaling functions for independent retail stores as well as for their own outlets. Beckman and Nolen, *The Chain Store Problem*, p. 8.

[22] See e. g., Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, and chain store tax statutes cited, *supra*, n. 3, p. 13. See also Beckman and Nolen, *The Chain Store Problem*, pp. 246–289; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, 534–536; *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 419–421, 426–427, rehearing denied, 302 U. S. 772.

chain's competitive advantage by permitting it to pay substandard wages to employees engaged in its warehouse and wholesale distribution units. "To hold otherwise would defeat the expressed purpose of the Act to prevent making interstate commerce an instrument of competition in the distribution of goods produced under substandard labor conditions." *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, at 784 (C. C. A. 7).

Particularly when consideration is given to the implications of petitioner's position and its impact upon the scope of the Act, it must not be presumed that Congress intended such a result. If all employees of a whole chain store enterprise are to be included within the exemption, vast segments of nonretail industries plainly intended to be covered by the Act will be withdrawn from its scope by the continued expansion of the wholesaling and manufacturing functions of chain store enterprises. The serious curtailment of the scope of the Act that might result from petitioner's theory was graphically indicated in the case of *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3), where it was claimed that the entire American Stores chain system, including eleven warehouses, seven bakeries, a six story central office building, a bottling works and a large food processing and manufacturing plant, in addition to its approximately 2,300 retail stores constituted a single "re-

tail establishment" within the exemption of Section 13 (a) (2).[23]

The legislative history of Section 13 (a) (2) certainly does not require the exemption of a whole chain enterprise or its nonretail units. It shows that the employees whom Congress intended to exempt are those engaged in ordinary grocery and department stores and the like, not central office and warehouse employees of a multi-unit chain who are engaged in the interstate purchase and distribution of goods. See *Walling* v. *American Stores Co.*, 133 F. (2d) 840, 843-844 (C. C. A. 3); Judge Garrecht dissenting in *Walling* v. *Block*, 139 F. (2d) 268, 272, 273 (C. C. A. 9) certiorari denied, 321 U. S. 788.

---

[23]The Third Circuit rejected this contention pointing out that if it were to be adopted "any manufacturer or wholesaler, no matter how large, would bring himself within the exemption through establishment of his own retail outlets for sale to intrastate customers" and that "the legislative policy of the Act as expressed in Section 2 is not to be defeated by such artificial enlargement of two words used in an exemption clause." 133 F. (2d) at 844. The Court held that the warehouses and manufacturing and processing plants of the chain were distinct establishments and were not exempt. It concluded that the apparent intent of Congress was to exempt retail stores and establishments "comparable to the intrastate 'local' or 'corner grocery man', 'druggist', 'meat dealer', 'filing-station man', or * * * 'department store.'" 133 F. (2d) at 844. See also *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, 783 (C. C. A. 7).

Petitioner undertakes to distinguish these decisions on the ground that the employers operated manufacturing and processing plants as well as warehouses (br., pp. 10, 13-14). But both courts plainly based their conclusions on the premise that Congress intended to exempt only ordinary retail stores.

C. THE LEGISLATIVE HISTORY OF SECTION 13 (a) (2) SHOWS THAT CONGRESS DID NOT INTEND TO EXEMPT EMPLOYEES IN CHAIN STORE WAREHOUSES

The original Black-Connery Bill [24] contained no exemption comparable to Section 13 (a) (2). A month before the enactment of the statute in its final form, however, the House adopted an amendment, from which Section 13 (a) (2) developed, exempting "any retail industry, the greater part of whose sales is in intrastate commerce." The adoption of this amendment followed a discussion during which several Congressmen expressed their desire to assure the exemption of small retailers—"the corner grocery store man or the filling station man" and "the local groceryman, druggist, clothing store, meat dealer—any merchant in fact." Representative Celler, the sponsor of the amendment, stated: "accept it and then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt." See 83 Cong. Rec. 7436–7438.

The exemption did not become law in the form in which it first passed the House. In the House-Senate conference it appeared in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, as an exemption of employees "engaged in any retail *establishment* the greater part of whose selling is in ~~interstate~~ intrastate commerce." Still later, the words "or service" and "or servicing"

[24] S. 2475 and H. R. 7200, 75th Cong., 1st sess., May 24, 1937.

were inserted without comment.[25] Section 13 (a) (2) then assumed the form in which it became law.[26]

Two points stand out in this brief history. First, despite some general statements about exempting "retailing,"[27] the only specific illustrations used by the legislators who supported the amendment named those establishments which first come to mind when we speak of "local retailers" or "local retail establishments"—that is, grocery stores, filling stations, butcher shops, dry goods stores, clothing stores, and department stores—all of them establishments which serve the consuming public directly. Second, in the exemption which was finally enacted the Conference Committee substituted the narrower and more precise word "establishment" for the broad term "industry." Whatever the exemption may have meant in its original form, its final language was restricted to the establishment or place of business which makes retail sales. We may not say that Congress meant nothing by this change. Cf. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 448. Against any argument that would enlarge the exemption beyond the illustrations given by its

---

[25] Perhaps to make clear the exemption of the "filling station man" and of establishments like restaurants which do not make "sales" in the strict sense. See *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 106 (C. C. A. 9).

[26] See H. Rep. No. 2738, 75th Cong., 3d sess., p. 32.

[27] See 83 Cong. Rec. 7438.

supporters, the change in phraseology is decisive (*Fleming* v. *American Stores Co.*, 42 F. Supp. 511, 517–518 (E. D. Pa.), modified and affirmed, 133 F. (2d) 840 (C. C. A. 3)), for the words finally used conform in their accepted meaning to the purpose which the Congressmen who proposed the amendment expressed.

The courts have given effect to this legislative history and, except in the *Block, Wiemann,* and *Allesandro* cases,[28] have refused to extend the exemption beyond ordinary retail stores. "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571). The exemption is to be confined typically to "grocery stores, drug stores, hardware stores and clothing shops" (*Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517), to "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (*Bracey* v. *Luray*, 138 F. (2d) 8, 10–11 (C. C. A. 4), and to "restaurants, hotels, laundries, garages, barber shops, beauty parlors, funeral homes, shoe-shining parlors, clothes pressing clubs, and the like" (*Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138

[28] *Walling* v. *Block*, 139 F. (2d) 268 (C. C. A. 9), certiorari denied, 321 U. S. 788; *Walling* v. *Wiemann Co.*, 138 F. (2d) 602 (C. C. A. 7), certiorari denied, 321 U. S. 785; *Alessandro* v. *C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6).

F. (2d) 13, 15 (C. C. A. 8)). See also *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. (2d) 79, 80 (C. C. A. 5); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101, 107 (C. C. A. 9); *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9); *Sun Pub. Co.* v. *Walling*, 140 F. (2d) 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Walling* v. *Roland Electrical Co.*, 8 Wage Hour Rept. 82 (C. C. A. 4, 1945); *Walling* v. *Peoples Packing Co.*, 132 F. (2d) 236 (C. C. A. 10); *Walling* v. *Sondock*, 132 F. (2d) 77 (C. C. A. 5). *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 46–47 (W. D. Tenn.).

Petitioner's warehouse and central office employees are not engaged in anything comparable to the establishments thus described, with which alone Congress was expressly concerned. Moreover, the considerations leading to the exemption of the one do not apply to the other. On the contrary, as pointed out earlier (*supra*, pp. 19–20, 26–28), the duties and economic position of employees in petitioner's chain store warehouse are the same as the duties and economic position of the independent wholesaler's employees who, when they are engaged in commerce, are subject to the Act and outside any exemption. Section 13 (a) (2) should not be expanded without reason to cover a situation quite different from the one to which it was directed.

Petitioner would ignore these factors and the

evidence of Congressional intent that most courts have found persuasive, on the ground that the words are too clear to permit recourse to extrinsic evidence (br., pp. 3, 16). We submit that if the words are so clear and unambiguous, the clarity is in the direction of the restricted exemption and not the broad one asserted by petitioner.

D. IF THE MEANING AND PURPOSE OF THE EXEMPTION WERE OTHERWISE UNCERTAIN, THE CONSISTENT ADMINISTRATIVE INTERPRETATION SHOULD BE DECISIVE

We submit that the foregoing considerations—the natural ordinary meaning of the statutory language, the accepted governmental and business usage, the legislative history, and the relevant economic factors—leave no doubt of the correctness of the Administrator's interpretation of the exemption. Petitioner's contention that the words "retail establishment" unambiguously include petitioner's chain store warehouse clearly is without foundation. Under N. R. A., the very industry of which appellant is a member, expressly defined "Retail Food and Grocery Establishment" and "establishment" to exclude such warehouses and treated them as wholesale establishments under a separate wholesalers' code. (See p. 16, *supra*.) Petitioner in effect asserts that although state legislatures, the Bureau of the Census, the Bureau of the Budget for all federal departments, the N. R. A. code authorities, industry, and the

courts, have used the phrase as excluding chain store warehouses, here, nevertheless, as a matter of etymology, that is not even a permissible interpretation. The argument answers itself.

If the meaning and intent of the language were otherwise uncertain, the Administrator's view should be adopted according to well settled and salutary principles of statutory construction.

"The Act is remedial in its nature and should be liberally construed and the exceptions to the coverage of the Act should be narrowly construed." *Calaf* v. *Gonzalez,* 127 F. (2d) 934, 937 (C. C. A. 1). Where the court has an equal choice between two interpretations, one of which will permit employees plainly covered by the Act to retain its benefits and the other of which will deny its benefits to such employees, the former construction must prevail. See *Theological Seminary* v. *Illinois,* 188 U. S. 662, 671; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; *United States* v. *Stewart,* 311 U. S. 60, 71; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491. See also cases cited pp. 9–10, *supra.*

Moreover, decisive weight should be attached to the administrative interpretation here because it has been consistently maintained and represents the result of thorough consideration of all relevant factors. See *Skidmore* v. *Swift & Co.,* No.

12, this Term, decided December 4, 1944. The Administrator announced his view of the scope of the Section 13 (a) (2) exemption shortly after the Act became effective and he has adhered to it consistently. In Interpretative Bulletin No. 6, issued in December 1938,[29] he interpreted "retail establishment" to apply typically to grocery stores, clothing stores, and the like, which sell to the general consuming public. The bulletin made it clear that the "establishment" is the unit store and that in the case of chain store systems a central warehouse, physically separated from the stores, is a separate "establishment," which is not exempt because it does no retail selling.[30]

The Administrator has consistently maintained this interpretation. In the *First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor* (January 8, 1940), p. 21, he informed the Congress that "each physically separated store of a chain of stores will be considered a separate 'retail estab-

---

[29] Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, reprinted in 1940 Wage and Hour Manual (Bureau of National Affairs, Inc., Washington, D. C.), pp. 154–158. A copy of the pertinent portions of this Bulletin is printed in the Appendix, pp. 40–45, *infra*.

[30] Interpretative Bulletin No. 6, paragraphs 1, 3, 6, 17, 18.

lishment'. The warehouses and central executive offices of the chain are not 'retail establishments.' " He has reviewed and revised the Interpretative Bulletin from time to time but has never changed this principle. The Circuit Court of Appeals for the Seventh Circuit was mistaken when it stated in *Walling* v. *Wiemann Co., supra,* that the Administrator's view had been altered to meet the needs of litigation. The latest detailed statement of his position is set out in the June 1941, revision of Interpretative Bulletin No. 6, paragraphs 1–4, 11–12, and 33–37 of which are reprinted in the appendix to this brief.

Consistent administrative interpretation of the Act is entitled to great weight in judicial construction. "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application". (*Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 580–581, n. 17). The Administrator's interpretation has added significance where, as here, "the thoroughness * * * in its consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements" are evident *Skidmore* v. *Swift & Co.,* No. 12, this Term, decided December 4, 1944, slip opinion, p. 5.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
DOUGLAS B. MAGGS,
Solicitor,
ARCHIBALD COX,
Associate Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
United States Department of Labor.

FEBRUARY 1945.

APPENDIX

INTERPRETATIVE BULLETIN NO. 6 (1941 REVISION)

1. Section 13 (a) (2) of the act grants an exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7, as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.[1]

2. The scope and applicability of section 13 (a) (2) are set forth in the statute itself; if the facts of a particular case satisfy the terms of the section an exemption is automatically available. The statute confers no authority upon the Administrator to extend or restrict the scope of section 13 (a) (2) or to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties until he is directed otherwise by the authoritative ruling of the courts or until he shall subsequently decide that his prior interpretation is incorrect.[2]

---

[1] The word "whose" in section 13 (a) (2) is interpreted to refer to the selling or servicing of the "establishment" rather than the selling or servicing of any particular "employee" of the establishment.

[2] The United States Supreme Court has stated that the interpretations expressed in the interpretative bulletins of this Division are entitled to great weight. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534.

3. The courts have indicated that all exemptions in the act should be construed narrowly.[3] The person claiming an exempton must show affirmatively that his case falls both within the language and the statutory purpose. Section 13 (a) (2), was intended to apply typically to the grocery store, butcher shop, haberdashery, clothing store, filling station, beauty parlor, hotel, and similar commonly recognized retail and service establishments. Unless an establishment is clearly a retail or service establishment for purposes of section 13 (a) (2), an assumption that the exemption applies involves considerable risk of violation.

4. Since section 13 (a) (2) grants an exemption from the wage and hour provisions contained in sections 6 and 7 of the act, it seems logical in any given case to determine first whether these sections are applicable by their own terms. Unless an employee is engaged in interstate commerce or in the production of goods for interstate commerce, sections 6 and 7 are not applicable and accordingly it becomes unnecessary to ascertain whether section 13 (a) (2) affords an exemption. In this connection, attention is directed to Interpretative Bulletins No. 1 and No. 5 which discuss the coverage of sections 6 and 7.

* * * * *

11. A retail establishment is patronized regularly by the general consuming public. It is characteristic of wholesale establishments to exclude the general consuming public, as a matter of established business policy, and to confine their sales

[3] *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th); *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1st); *Wood* v. *Central Sand and Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.).

to other wholesalers, retailers and large-scale industrial or business purchasers. As a general rule, any establishment which refuses to sell to the general consuming public will not be considered a retail establishment. In some cases, however, the sales of an establishment are made almost exclusively to business and industrial purchasers, even though the establishment does not actually refuse to sell to the general consuming public. Thus, many establishments are engaged in selling goods which have only an industrial or business market, e. g., establishments engaged in selling production machinery, freight trailers, oil-well drilling machinery and equipment, etc. These establishments are not retail establishments within the meaning of section 13 (a) (2) since they do not sell regularly to the general consuming public.[4]

---

[4] Ordinarily the following types of goods have only an industrial or business market and are not sold to the general consuming public. Accordingly, sales of such goods, in the ordinary case, are not retail. It should be noted that the types of goods listed below are merely examples and do not comprise an exhaustive enumeration.

Automatic vending machinery, butchers' equipment, filling station equipment, hotel and restaurant equipment, soda fountain equipment, and store equipment.

Construction equipment (such as derricks, scaffolding, and elevators), construction machinery (such as concrete mixers, sanding and polishing machines, excavating shovels, and graders), and road machinery and equipment.

Bakers' equipment, bottles and bottling equipment, canning machinery, chemical equipment, conveyor and hoisting machinery, drilling machinery, foundry equipment, jewelers' equipment, machine tools, mechanical rubber goods (such as belting, packing, gaskets, and recoil pads), mill and mine supplies, power engines, powerhouse equipment (such as

12. A retail sale is a sale of goods for direct consumption and not for purposes of resale or redistribution in any form. Sales to wholesalers, jobbers, or retailers for resale by them are not retail sales, regardless of the price or quantity involved.[5] Similarly, the distribution of goods from a chain-store warehouse to retail stores of the chain is not retail distribution, and the warehouse is not a retail establishment. The fact that the distribution from the warehouse to the stores does not involve a "sale" in the strict legal sense does not alter the nonretail character of the distribution. In some cases, however, an establishment exchanges goods as a favor to a competitor. For example, an automobile dealer may have a demand for a maroon-colored automobile which

---

boilers, condensers, injectors, filters, and stokers), printers' and lithographers' supplies, shoe machinery, textile machinery and equipment, and welding equipment.

Dental supplies and equipment (such as dentists' chairs, drilling machines, X-ray machines, etc.), pharmacists' supplies, school equipment and supplies (such as schoolroom blackboards, schoolroom desks, etc.), laboratory equipment and supplies, and hospital equipment and supplies (such as operating instruments, X-ray machines, operating tables, etc.).

Barber and beauty parlor equipment, dry cleaners' supplies, commercial laundry equipment and supplies, plumbers' equipment, shoe repairers' equipment, undertakers' supplies, upholsterers' supplies, and warehouse equipment and supplies.

Commercial aircraft and aeronautical equipment, railroad equipment and supplies, commercial ship equipment and supplies, and other commercial transportation equipment and supplies (such as tramways, aerial hoists, motorboats, and compressed-air tubes).

[5] An additional ground for reaching the same result is that sales for purposes of resale normaliy involve large quantities of goods and discounts from the regular retail price.

he does not have in stock. To satisfy his customer, the dealer exchanges a black car for a maroon model which his competitor has in stock. In our opinion, such exchanges may be disregarded in analyzing the selling of the establishment.

RETAIL OR SERVICE ESTABLISHMENT

33. A determination of the meaning of the word "establishment" in section 13 (a) (2) is necessary not only in order to decide whether an enterprise, or portion thereof, is within the exemption but also to ascertain whether the provision of the exemption, requiring that the greater part of the selling or servicing of an establishment be in intrastate commerce, has been satisfied. *The word "establishment" as used in section 13 (a) (2) ordinarily means a physical place of business.* In the case of the independent grocery store or butcher shop, the entire business is conducted in a single establishment.

34. *The term "establishment" is not synonymous with the words "business" or "enterprise" as applied to multi-unit companies.* Thus, for example, a manufacturing company which has its own retail outlets operates a number of separate and different types of establishments. *Each physically separated place of business must be considered as a separate establishment, and the applicability of the exemption depends upon whether the particular establishment possesses the characteristics of a retail or service establishment.*

35. The unit store will ordinarily constitute the retail or service establishment contemplated by the exemption, even though it may be operated as a concession in a hotel, railroad station, or general

market. In such cases, the structure of the enterprise is relatively simple and the independent ownership of the particular store or shop will usually be the determining consideration.

36. The large department store normally is a complicated enterprise engaged in retail selling. It carries a wide variety of lines of merchandise which are ordinarily segregated or departmentalized not only as to location within the store, but also as to operation and records. However, if there is unity of ownership of all departments, and if all departments are operated as a single store, the enterprise, taken as a whole, will ordinarily be considered to be the establishment within the meaning of section 13 (a) (2).[6]

37. The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. *In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption. The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants, or other nonretail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments.*

[6] If any department in the store is engaged in manufacturing operations, the exemption applicable to the rest of the store is not applicable to that department.

U. S. GOVERNMENT PRINTING OFFICE: 1940

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION

CHARLES B. RUGG,
Amicus Curiae

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

GEORGE H. ELLIS CO., PRINTERS, BOSTON

INDEX

AUTHORITIES CITED

PAGE

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as *amicus curiae* in the above-entitled case. Counsel for both parties have assented in writing as indicated by letters filed with the clerk of this Court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include 19 national and 30 state retail associations. A list of these members is attached hereto as Appendix A. The question involved in this case is of direct interest to the members of the Federation.

Respectfully submitted,

CHARLES B. RUGG

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

February, 1945

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court (R-11-20) is reported in 50 F. Supp. 749, and the opinion of the United States Circuit Court of Appeals for the First Circuit (R-23-30) is reported in 144 F. (2d) 102.

JURISDICTION

Jurisdiction is conferred under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether record clerks and stock clerks employed in the central office and warehouse of a retail chain-store enterprise are "engaged in any retail . . . establishment . . ." under Section 13(a)(2) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C. Sec. 201 *et seq.*)

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in Appendix B *infra*, p. 36.

STATEMENT OF THE CASE

A. H. Phillips, Inc. is engaged in the retail grocery business in Western Massachusetts and Northern Connecticut. It operates forty-nine stores. All are within radius of thirty-five miles of Springfield, Massachusetts, where its offices and warehouse are located. (R-13). Nine of the stores are in Connecticut. Its annual gross business approximates $1,500,000. (R-11).

The warehouse services all the stores. Except for bread, pastry and milk, which is secured from local sources (R-14, 15), the merchandise is delivered at the warehouse before it is divided and delivered to the individual stores according to need. (R-14). Most (eighty percent) of the merchandise comes from states other than Massachusetts. (R-13). A record is kept of the goods stored at the warehouse at all times and the average inventory at the warehouse approximates fifteen percent of the gross annual business. Merchandise arrives at the warehouse by rail and truck and is delivered to the stores by means of the petitioner's own trucks. (R-14). The merchandise is then sold and delivered at the several retail stores. (R-11).

The stores are so situated that they do not compete with each other, but the competition with other grocery stores is

very keen. Next to the cost of goods sold, wages constitute the largest item of expense. (R-12). Each store has its own manager, who, in turn, is responsible to one of three division superintendents. Separate accounts are kept for each store and transfers of merchandise between stores are frequent.

The checking of invoices, paying of bills, checking of direct deliveries, keeping of records of warehouse inventory, making up of payrolls and the maintaining of the inventories of each store, together with the keeping of its cash and credit records, is all done by office employees who work in the central offices located in the same building as the warehouse. (R-15, 16). A receiving clerk and a shipping clerk also work there and three superintendents have headquarters in the same building. Warehousemen and helpers handle the incoming and outgoing merchandise and the storing of it at the warehouse. There is no attempt made to segregate the duties of any employee between activities which cross state lines or which relate to merchandise which has crossed or will cross state lines and those that do not.

A complaint was filed in March, 1942, seeking to enjoin the defendant from asserted violations of the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act. The defendant filed an answer denying that employees were subject to the provisions of Sections 6 and 7 of that Act and asserting that the exemptions in Sections 13(a)(1) and 13(a)(2) applied to its central office and warehouse employees. At the trial before the United States District Court, the facts were stipulated by the parties and adopted by the trial judge. (R-11).

SUMMARY OF ARGUMENT

An examination of the entire legislative background of Section 13(a)(2) shows the words "retail . . . establishment" refer to a retail enterprise considered as a whole

and fails to reveal any Congressional intention to apply that exemption to parts but not to all of an integrated retail enterprise. A construction of the words "retail . . . establishment" that comprehends an integrated business is in line with prevailing and accepted governmental and business usage and is in harmony with the facts relating to the petitioner's business. However, even if each physically separated unit is considered a separate establishment, similar considerations indicate that the central office and warehouse building that functions as an integral part of a retail business is, nevertheless, a "retail . . . establishment". Any construction of Section 13(a)(2) that shrinks the scope of its coverage so as to exclude such a central building or warehouse, produces, as a practical matter, such absurd consequences that it cannot be presumed to have been the construction intended by Congress.

PRELIMINARY STATEMENT

This brief is filed on behalf of the American Retail Federation, Washington, D. C. Membership in this association includes the nineteen national and thirty state retail associations listed in Appendix A, the membership of which, in turn, includes more than 500,000 stores.

Most retailers serve a single local community but many retail enterprises serve several local communities.[1] Sometimes these communities are situated in more than one state but more often they are all located within a single state. In either case a very large proportion of the merchandise sold comes from states other than the one where the stores are located and very frequently the retailer uses a warehouse rather than space in the stores for receipt of that merchandise and its storage before it is delivered to the stores for sale. Moreover many retail enterprises with

[1] See Statistical Abstract of the United States, 1942 (U. S. Department of Commerce, Bureau of the Census) p. 969, Table No. 940.

more than one store have found it more efficient and economical to have the executive and clerical staff centrally located.

This case presents the problem of determining the status under the Fair Labor Standards Act of employees working in warehouses and central office buildings that function as an integral part of a retail business. Such retail businesses may vary in size from a store that has a single outside storeroom to business enterprises with thousands of selling units and scores of buildings devoted to warehouses and processing plants. The petitioner's business is typical of a large group of retail enterprises[2] that engage solely in the distribution of merchandise at retail through one or more stores, serviced by one or more warehouses and with the executive officers and the record and payroll clerks located in a central office. Accordingly, a decision by this Court of the issue raised in this case is of direct interest to the many retailers in this country who are connected directly or indirectly with the American Retail Federation.

The petitioner is engaged in selling groceries at retail to customers, some of whom are in Connecticut, most of whom are in Massachusetts, but all of whom are within the comparatively small area of thirty-five miles from the City of Springfield, Massachusetts. The actual retail sales are, of necessity, made in its forty-nine stores. As in any retail business, the sale of its merchandise to the consumer is the petitioner's goal and its entire organization is designed to accomplish those sales in the most efficient manner. The petitioner operates in a highly competitive field (R-12) and efficiency of operation is obviously necessary if the enterprise is to prosper. Efficiency of operation required that

[2]It must not be supposed that only a few companies or owners operate more than one store. See, Statistical Abstract of United States, *Supra*, pp. 967-972. The evidence in *Tax Commissioners v. Jackson*, 283 U. S. 527, 532, indicated that in a depression year in the typical state of Indiana there were more than 500 companies or persons who operated two or more stores.

certain phases of the business be segregated and consequently the petitioner established a central building in Springfield, Massachusetts, where its executive offices are located and where it employs some clerks who keep inventory, accounting or like records, and some clerks who store, move, receive, ship, mark, or otherwise handle goods. With the overall administrative and executive functions thus centrally located, the petitioner operates as an integrated whole with its nerve center situated in Springfield.

The Administrator of the Wages and Hours Division has sought to split an integrated business by driving a wedge between that part of the petitioner's business that happens to be conducted in the stores and the part that is carried on in the central building. Although the Administrator has been given no statutory power to construe the exemption contained in Section 13(a)(2) of the Act, he pulverizes unified retail enterprises in an attempt to bring parts within the Act by insisting, for example, that the stock clerk working in the storehouse must be treated in accordance with the Act, while the stock clerk working in the store and performing the same or substantially similar work, need not be so treated.

Since the petitioner's business is typical of many other retail businesses,[3] the decision by this Court as to whether the petitioner's record clerks or stock clerks are covered by the Fair Labor Standards Act is of the greatest importance to the retail industry generally.

It is this last fact which prompts us to call attention to the fact that in a case of this type there are ordinarily[4] two questions presented for decision: first, whether there is initial coverage for the central office and warehouse em-

---

[3] See Note 2, *supra*.

[4] For example, see *Walling* v. *Goldblatt Bros. Co.* (CCA 7) 128 F. (2d) 778; cert. den. 318 U. S. 757; s.c. 56 F. Supp. 255; *Walling* v. *Block* (CCA 9) 139 F. (2d) 268; cert. den. 321 U. S. 788; *Walling* v. *L. Wieman Co.* (CCA 7) 138 F. (2d) 602 cert. den. 321 U. S. 785.

ployees under Sections 6 and 7 of the Act, and second (the question presented in the instant case), whether, if there is such coverage, the employees are covered by any of the retail exemptions in the Act. For some reason not known to us, the first question is not raised in this case. We doubt that, on the present record, with its vague and summary descriptions of the duties of the individual employees involved, such question could adequately be presented.

The Administrator, as the instant proceeding bears witness, has been ever vigilant to maintain the broadest possible scope of jurisdiction under this Act, and, until rejected by the cases of *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572, pressed the notion that all warehouse employees occupied an intermediate, not terminal, position in interstate commerce.[5] The Administrator has revived his notion. Although it takes a slightly different form, the Administrator's claim is that the continuity of movement through warehouses connected with retail stores is sufficiently rapid to warrant the application of coverage under the Act.[6] Rapid turnover of inventory is a traditional objective of merchandising. In some lines of businesses, as for instance those involving the sale of perishable articles, the inventory turnover must be rapid if a business is to survive. However, in these days of shortages the turnover is rapid in nearly every mercantile enterprise since it is practically impossible to accumulate any backlog of merchandise. Consequently, the Administrator's slightly altered claim in

---

[5]See: Brief for Petitioner, *Walling* v. *Jacksonville Paper Co.* No. 336, October Term 1942, pp. 13-18; Petition for Certiorari, *Walling* v. *Goldblatt Bros. Inc.*, No. 418, October Term 1942, pp. 9-11.

[6]See, for example, the following cases decided after the *Jacksonville* opinion: *Walling* v. *L. Wieman Co.* (CCA 7) 138 F. (2d) 602, 605; *Allesandro* v. *C. F. Smith Co.* (CCA 6) 136 F. 2d 75, ; *Walling* v. *Consumers Co.*, 57 F. Supp. 523, 524; *Walling* v. *Goldblatt Bros.*, 56 F. Supp. 255, 256, 7.

respect of coverage is about as broad as it was before the decisions in the *Jacksonville* and *Higgins* cases.

We think the questions of (1) whether employees in retailers' central offices and warehouses are engaged "in commerce"; (2) whether the "practical continuity of transit" to which reference was made by Mr. Justice Douglas in the *Jacksonville* opinion[7] properly applies to a warehouse operated as an integral part of a *retail* business, and if it does apply (3) how rapid must warehouse inventory turn over be before there is "that practical continuity of transit"—all are questions of sufficient importance to justify their separate consideration in a decision based on an adequate record. We mention these facts because, in the absence of a clear statement indicating that such is not the intent, there appears to be a possibility of all three questions being decided *innuendo* in the instant case if the failure to raise the initial coverage question in the instant proceeding were considered the equivalent of a decision in favor of the contentions advanced by the Administrator.

ARGUMENT

PETITIONER'S CENTRAL OFFICE AND WAREHOUSE EMPLOYEES ARE ENGAGED IN A "RETAIL . . . ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13(A)(2) OF THE FAIR LABOR STANDARDS ACT.

Section 13(a)(2) provides that the wage and hour sections of the Act, Sections 6 and 7, shall not apply with respect to "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing

[7] "We do not mean to imply that a wholesalers' course of business based on anticipation of needs of specific customers rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act." 317 U. S. 564, 570.

is in intrastate commerce". A difficulty has arisen because the Administrator, although having no special power to construe this section of the Act, has asserted[8] that, in his view, an "establishment" means a physically separated building and that a central office and warehouse functioning as part of a retail enterprise is not a "*retail . . . establishment*". These assertions by the Administrator are entitled to scant consideration in this case.[9] The Administrator's stubborn insistence upon the correctness of his own inter-

---

[8]Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, issued December 7, 1939, and reprinted in 1940, Wage and Hour Manual (Bureau of National Affairs, Inc., Washington, D. C.) pp. 154-158; revised and reissued June 16, 1941, and reprinted in 1942 Wage and Hour Manual, pp. 326-347.

[9]This is not a situation to which the doctrine that interpretative bulletins carry persuasion as an expression of the view of those charged with responsibility of administering the Act, is fully applicable. See *Overnight Motor Co.* v. *Missel*, 316 U.S. 512, 580-581, n. 17; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 539. The interpretation by the Administrator covering retail employees that work in central office and warehouse buildings has been resisted from the first. See: *Walling* v. *Block*, (CCA 9) 139 F. (2d) 268; cert. den. 321 U. S. 788; *Walling* v. *L. Wieman Co.* (CCA 7), 138 F. (2d) 602; cert. den. 321 U. S. 785; *Allesandro* v. *C. F. Smith Co.* (CCA 6) 136, F. (2d) 75; *Fleming* v. *American Stores Co.* (CCA 3) 133 F. (2d), 840; *Walling* v. *Goldblatt Bros.* (CCA 7), 128 F. (2d), 778; cert. den. 318 U. S. 757; *Tagler et al* v. *Carpenter Coal Co.* (USDC N.D. Ill. E.D.) 57 F. Supp. 314; *Walling* v. *Consumers Co.* (USDC N.D. Ill. S. D.) 57 F. Supp. 523; *Walling* v. *Goldblatt Bros. Inc.* (USDC N.D. Ill.) 56 F. Supp. 255; *Vogelpohl* v. *Lane Drug Co.* (USDC N.D. Ohio) 55 F. Supp. 564; *Wheeling* v. *Roland Electrical Co.* (USDC D. Md.) 54 F. Supp. 733; *Walling* v. *Fred Wolferman, Inc.* (USDC W.D. Mo., W.D.) 54 F. Supp. 917 *Remington* v. *Shaw* (USDC W.D. Mich.) 52 F. Supp. 465; *White* v. *Jacobs Pharmacy Co.* (USDC N.D. Ga.) 47 F. Supp. 298; *Duncan* v. *Montgomery Ward & Co., Inc.* (USDC S.D. Texas) 42 F. Supp. 879; *Veazey Drug Co.* v. *Fleming* (USDC W.D. Okla.) 42 F. Supp. 689; *Jehs* v. *Singer Sewing Machine Co.* (USDC N.D. Okla.) 1 W.H. Cases, 814.

pretation, in the face of overwhelming[10] judicial authority to the contrary, is not a factor that should persuade any court to adopt that interpretation.

The word "establishment" also appears in Section 12(a) of the Act pursuant to which the shipment in interstate commerce of "any goods produced in an establishment situated in the United States in or about which . . . any oppressive child labor is employed . . ." is prohibited. It may be argued that "establishment" as used in Section 12(a) refers to a place and Congress intended that the same meaning be given to the word in Section 13(a)(2).

---

[10]See cases cited in footnote 9. Except for the dissenting opinion in *Walling* v. *Block*, 139 F. (2d) 268, the case at bar stands alone as an instance where the Administrator's interpretation, as applied to a retail business of which the petitioner's is typical, finds judicial support. *Walling* v. *American Stores Co.* 133 F. (2d) 840 CCA 3) is clearly and markedly distinguishable since it was a large enterprise which, in addition to 2300 stores and several warehouses, included processing and manufacturing plants and subsidiary corporations. The Court refused to call such an industrial octopus a single retail establishment. *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, has sometimes been mistakenly assumed to give judicial approval to the Administrator's interpretation, because in discussing the exemptions in the Act the statement was made (p.783), ". . . we think that such elimination of applicability was intended to include only ordinary stores, Fair Labor Standards Act of 1938, §13(a) (2) . . . and not a great *establishment* shipping supplies out of the state to two of its important outlets" (italics supplied). A careful reading of that decision indicates that the language relates "to employees who *manufacture* goods in the warehouses for shipment to Indiana" (italics supplied). The Court later in the opinion points out that the exemption issue was not before it. It is significant, however, that the Court's use of the word "establishment" in the first quotation to mean the entire Goldblatt enterprise is precisely the opposite of what the Administrator contends is meant by that word. Even in a situation which presents the collarary proposition, the courts have with the exception noted above, been consistent. Thus the Supreme Court of Tennessee in holding a business which included wholesaling and manufacturing as well as retail operations, not to be a retail establishment", examined the entire business enterprise. *Johnson* v. *Phillips-Buttdorf Mfg. Co.*, 178 Tenn. 559, 561, 160 S.W (2d) 893.

We submit that even if the word "establishment" as used in Section 12(a) were given the meaning for which the Administrator contends, it does not follow that it must be similarly defined when used in Section 13(a)(2).

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld* v. *Legh*, L.R.4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433.

The legislative background of the two sections is not the same. The child labor section of the Fair Labor Standards Act had a legislative history distinct from the rest of that statute. See *Western Union Telegraph Co. v. Lenroot*, October Term 1944, No. 49, decided January 8, 1945. The scope of the two sections is different. Section 12(a) does not apply to child labor employed directly in interstate commerce. *Ibid.* On the other hand, Section 13(a)(2)

since it involves the distributive and not the manufacturing trades, applies only to employers "engaged in commerce" and not those "engaged . . . in the production of goods for commerce" (Sections 6 and 7). Consequently, the subject matter to which the word "establishment" refers in Sections 12(a) and 13(a)(2) can not be the same in each case. Still another reason exists: the scope of the legislative power exercised in the child labor section is broader than that exercised in the sections establishing the retailers' exemptions. The second phrase of coverage, namely, "engaged in the production of goods for commerce" when read in the light of the pertinent definitions in Section 3, more nearly exhausts the plentitude of Congressional authority to regulate commerce than the first phrase of coverage—"engaged in commerce".[11] With this variance in legislative history, scope, subject matter and exercise of legislative power regardless of the meaning given to the word "establishment" in the child labor section of the act, no reason exists for not giving to the word the broad meaning which Congress intended that it should have when granting an exemption to the retail trades.

A. The Petitioner's Enterprise as a Whole Constitutes One Retail Establishment.

Three principal factors combine to support the position that the ordinary retail enterprise is one "retail establishment" within the meaning of those words as used in Sec-

[11]The broader scope results from sweeping within the second phrase of coverage, employees having any "necessary" connection with goods that eventually travel across a state line in commerce. *United States* v. *Darby*, 312 U. S. 100. *Kirschbaum* v. *Walling*, 316 U. S. 522. In speaking of the *Darby* case, Mr. Justice Frankfurter has said:

"We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act." *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 344, 355.

tion 13(a)(2): (1) the legislative background of the phrase; (2) the practice prevailing among governmental agencies dealing with labor, labor unions and retail merchants, of treating as one labor group all employees of a single retail enterprise (whether sales clerks, stock clerks, record clerks, or other employees); and (3) the practice prevailing among authorities on marketing, miscellaneous governmental agencies and retail merchants, of treating as one business unit all the functions of a retail enterprise (including buying, selling, storing, delivering, accounting and maintenance). In addition to the considerations generally applicable, the facts in the instant case point to the petitioner's business as a single retail establishment.

1. *The Legislative Background.*

In Appendix C (pp. 37-51, *infra*) we have set forth in some detail the legislative history of the retailers exclusion from coverage under the Fair Labor Standards Act. As the legislative history discloses, the exemption stated in Section 13(a)(2) was not in the bills as originally introduced in the Senate and the House of Representatives. That exemption was fostered by pressure from trade associations which represented and were acting in behalf of all types of retailing enterprises. Its sponsors, therefore, obviously intended a broad scope.

A similar breadth was intended by Congress. An examination of the legislative history reveals that there had been repeated statements on the floor of each house that the Act would not reach retailing in any form. But some legislators felt there should be a clear renunciation. To crystallize that sentiment Congressman Celler, on May 24, 1938, in the penultimate stages of the debate in the Third Session of the Seventy-fifth Congress, offered an amendment that none of the wage and hour provisions of the bill "shall be applicable to any retail industry the greater part of whose

selling is in intrastate commerce." Mr. Celler explained that under the amendment's terms "retailing is exempted," 83 Cong. Rec. 7438. After that explanation the Chairman of the House Labor Committee, Mrs. Norton, accepted the amendment for the Committee and the House voted for it. *Ibid.*

When the bill went to Conference, the conferees improved the phraseology of the exemption and gave it its present form. The Administrator has attempted to make much of the slight change in wording that took place at this stage of the proceedings. We submit it is wrong to isolate this particular bit of the legislative history and to deduce from it an intent on the part of Congress which is not warranted when that legislative history is viewed as a whole. Nothing in the legislative background out of which this retail exemption evolved, when considered in its entirety, even remotely suggests a Congressional intention to treat some retailers differently from others. Yet, under the construction which the respondent urges, only the single unit or the very small multi-unit retail businesses can qualify under the exemption in their entirety. To be sure, Mr. Justice Douglas has stated in the *Jacksonville* case that "It is quite clear that the exemption in §13(a)(2) was added to eliminate those retailers located near the state lines and making some interstate sales." 317 U.S. 564 at 571. It will be observed, however, that resort was had to the legislative history of the Act in the *Jacksonville* case to repel an inference there sought to be drawn that, since retailers are excluded by reason of the express provisions of the Act, wholesalers selling only to retailers in intrastate transactions should likewise be excluded. In any event we think that the substitution of the word "establishment" for "industry" is adequately explained by the fact that the word "industry" was a term defined by Section 3(h) to include several separate businesses as a group—in connection with the use of that word in Sections 5 and 8. Without any

change in the amendment, this artificial meaning of the word "industry" in Section 13(a)(2), although clearly inappropriate, would have been required by the statute (*Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95) and therefore, Congress improved the exemption by the substitution of a word, which, except for Section 3(h), was the substantial equivalent of "industry". Moreover, the selection by the conferees of the word "establishment" can be readily understood. That word was one with which retailers were entirely familiar. It was imported into the Fair Labor Standards Act from the National Recovery Administration Code of Fair Competition for the Retail Trade where it had been unmistakably defined not only to refer to "any store or department of a store, shop, stand or other place where a retailer carries on business", but also "to refer to the retailer who carries on business in such establishments."[12]

The conferees must have recognized that the definition in the National Recovery Administration Code of Fair Competition for the Retail Trade would, in the absence of strong reasons to the contrary, be controlling upon the courts. The National Industrial Recovery Act not merely was in *pari materia* with, but was actually the prototype for, the Fair Labor Standards Act. Similar phrases in successive statutes in the same field deserve similar interpretation. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 57 (CCA. 8); *N.L.R.B.* v. *Waumbec Mills*, 114 F. (2d)

[12]The full text of the definition of "establishment" in Section 3 of the Code approved October 21, 1933 (which was amended in respects not now material December 4, 1933, February 12, 1934 and August 23, 1934) as set forth in C. C. H. Federal Trade Regulation Service ¶8558.01 et seq. (104 C. C. H. 8354) follows:

"Sec. 3. Establishment. The term 'establishment' as used herein shall mean any store or *department* of a store, shop, stand or *other place where a retailer carries on business*, other than those places where the principal business is the selling at retail of products not included within the definition of retail trade. *The term is also used herein to refer to the retailer who carries on business in such establishments.*"

226, 232-233. Moreover, Congress must have known that the NRA usage, though not the only possible dictionary meaning, was the preferred meaning.[13] And finally, if a meaning different from the National Recovery Administration Code of Fair Competition for the Retail Trade was intended, Congress would presumably have said so in no uncertain terms at the same time it was giving explicit definitions in Section 3 of the Act of so many other terms.

2. *Employees of concerns such as the petitioner's, whether working in the retail outlets, the warehouse, or any other building operated by the retailing enterprise, are commonly treated and considered as one labor group.*

If analogies are to be examined to assist in determining the scope intended by Congress for Section 13(a)(2) of the Act, we think the field of labor offers the most pertinent ground of inquiry. In that field it is clear that governmental agencies, labor unions and employers customarily regard as one group all retail employees (whether working in a retail outlet, a warehouse or other building) who work for the same employer.

A common instance of this inclusive coverage is to be found in the administrative decisions under collective bargaining statutes such as the national and state labor relations acts. Under both the national[14] and the comple-

---

[13] Dictionaries define "establishment" as used in this sense as meaning either the staff of employees as a whole or a place of business run by that staff. Century Dictionary & Cyclopedia: "An organized * * * business concern and everything connected with it, as servants, employees, etc. * * *" Webster's New International Dictionary (2d ed.): "The place where one is permanently fixed for * * * business; also * * * place of business with its fixtures and organized staff * * *." Oxford English Dictionary: "An organized staff of employees or servants, often including, and sometimes limited to, the building in which they are located."

[14] *Montgomery Ward & Co. Inc.* (Chicago) 56 N.L.R.B. No. 42 Case No. 13—R-2374 (May 2, 1944) [CCH Labor Law Service, ¶6487].

mentary state [15] statutes, workers in one employer's retail outlets, warehouses and central buildings have often been grouped together in what the statutes call a single "appropriate unit". In at least two strongly analogous situations arising under state unemployment compensation statutes, the several units of a single business have been treated as one "establishment". *Spielman* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1; *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N.W. 87.

Another instance of administrative consolidation, peculiarly apposite here, is to be found in the operation of state minimum wage orders. The very earliest [16] state minimum wage order antedating *Adkins* v. *Children's Hospital*, 261 U.S. 525, as well as those of more recent vintage [17] tend to

---

[15] *In re Thayer McNeil Co.* Mass. L.R. Comm. Case No. CR 465 (1941), 9 L.R.R. Manual 387; In *re Hearn Dept. Stores, Inc.* N.Y. S.L.R.B. May 21, 1938. 2 L.R.R. Manual 569; *In re Keller Bros. Meat Products Co.* N.Y. S.L.R.B.—Case No. WE-204-7940, (1940), 7 L.R.R. Manual 255; *In re Stern Bros.* N.Y. S.L.R.B. Sept. 27, 1940 [C.C.H. Labor Law Service ¶42,096]; Cf. *Matter of Finlay-Straus, Inc.* (N.Y.) S.L.R.B., commented on in N. Y. State Labor Relations Board Report for the period from July 1, 1937 to December 31, 1939. It was there said (pp. 163-164);

"Where a business establishment is departmentalized, the degree to which the departments are interdependent and the extent of functional integration among the employees involved must be considered in determing the appropriate bargaining unit. Where the departments have been shown to be interdependent so that one could not operate without the other the Board has included all within a single unit. Thus in *Matter of Finlay-Straus, Inc.* the Board refused to place office and store employees of a retail chain into separate units, since the evidence showed that—'the business of the company was highly integrated, that the work in the office was a necessary part of the work in the stores, that a stoppage in the stores would seriously affect the work of the office, and that a cessation of the functioning of the office would necessitate a closing down of the store' ".

[16] Com. of Mass., Minimum Wage Commission, Bulletin No. 6, *Wages of Women in Retail Stores in Massachusetts* (1915), p. 17.

[17] U. S. Dept. of Labor, Women's Bureau, Bulletin No. 167, *State Minimum Wage Laws and Orders* (1939); *Ibid., Supplement;* U. S.

include under a single classification retail sales clerks, retail stock clerks and retail record clerks, regardless of the building where they work, provided their employer is a retail merchant.

A similar theory of inclusiveness is apparent from job classifications prepared by and vocational services furnished through United States Employment Service [18] and the National Vocational Guidance Association.[19]

Dept. of Labor, Women's Bureau, Bulletin No. 137, *Summary of State Hour Laws for Women and Minimum Wage Rates* (1936); New York Dept. of Labor, *Minimum Wage Order No. 3*, Dec. 16, 1932, which recites its coverage in these terms:

"Mercantile, i. e. work in establishments operated for the purpose of trade in the purchase or sale of any goods or merchandise, including the sales force, wrapping force, auditing or checking force, the shippers in the mail-order department, the receiving, marking, and stockroom employees and all other women, except those performing office duties solely."

Oklahoma Dept. of Labor, Minimum Wage Order No. 3, May 1, 1938, which recites its coverage in these terms:

"Retail mercantile, i.e. selling of merchandise to the consumer and not for the purpose of resale in any form; servicing, purchase, or sale of any goods, wares or merchandise; includes the sales, wrapping, auditing, or checking force, shippers in the mail-order department, and outside delivery men."

See also New Hampshire Bureau of Labor, *Mandatory Order No. 5*, Jan. 6, 1941; Massachusetts, Dep't of Labor, *Minimum Wage Commission, Directory Order No. 26*, Oct. 20, 1944; Oregon Dept. of Labor, *Wage and Hour Commission Order No. 8*, July 22, 1941; Montana *Rev. Code* (1935) §3073.1 et seq; Colorado *Stat. Anno.* (1935), 1939 *Cum. Supp.* c. 58, §§71-73, interpreted by Op. of Col. Atty. Gen., Sept. 9, 1937.

[18] U.S. Dept. of Labor, U.S. Employment Service, Job *Descriptions for the Retail Trade* (1938). This informative study with its careful introduction and classification shows that governmental experts having no litigation in view take as we do the position that a retail enterprise normally involves the very type of employees whose occupations are here at issue. Significantly this publication emphasizes the probabilities of transfer from one type of retail job to another, so that the interlocking pattern becomes more evident.

[19] The National Vocational Guidance Association and the United States Employment Service, study prepared under supervision of

Likewise in their general studies of labor conditions[20] and in their periodic statistical reports of wages, hours, volume of employment and kindred matters[21] both the United States and the State Departments of Labor group together all retail workers employed by companies such as the appellant.

Recognition by governmental agencies of the identity of interest among retail sales clerks, retail stock clerks and retail record clerks is matched by a similar recognition on the part of labor unions. There are in the retail field two outstanding labor organizations, the Retail Clerks' International Protective Association (affiliated with the American Federation of Labor) and the United Wholesale and Retail Employees of America (affiliated with the Congress of Industrial Organization), each of which embraces in its jurisdiction, and frequently in the same local chapter, retail sales clerks, retail stock clerks and retail record clerks in different buildings.[22]

Dorothea deSchweinitz, *Occupations in Retail Stores* (1937). See particularly ch. VIII, p. 201 et seq. and Table 16, p. 401.

[20] U.S. Dept. of Labor, Women's Bureau, Bulletin No. 125, *Employment Conditions in Department Stores* 1932-1933 (1936); Com. of Pennsylvania, Dept. of Labor and Industry, Special Bulletin No. 13, *The Personnel Policies of Pennsylvania Department Stores.* Compare Mary La Dame, *The Filene Store* (Russell Sage Foundation, 1940) p.75.

[21] U.S. Dept. of Labor, Bureau of Labor Statistics, *passim.* (See, as illustrative, *Monthly Labor Review,* Vol. 52, p. 248 (January 1941). At p. 250 it is stated that "The indexes for retail trade have been adjusted to conform in general with the 1935 Census of Retail Distribution.") Com. of Mass., Dept. of Labor and Industries, Pub. Doc. No. 15, Labor Bulletin No. 181, *Time Rates of Wages and Hours of Labor in Massachusetts* 1939, p. 41 (classifying department store and furniture store warehouse employees as "retail store employees").

[22] U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 618, *Handbook of American Trade Unions* (1936 ed.), p. 287. (It is there stated that the Retail Clerks International Protective Association admits "all persons employed in mercantile or mail-order establishments who are actively engaged in handling or selling mer-

Finally a retail merchant usually applies to workers throughout his enterprise a common labor policy.[23] A retail merchant customarily uses one personnel office to hire retail store clerks, retail stock clerks and retail record clerks, whether the work performed by these employees is in a retail outlet or a warehouse.[24] The retail merchant applies to all workers uniform provisions with respect to vacations, sick leave, and privileges peculiar to the retail industry, such as the significant permission to buy merchandise at an employee's special discount at any of his retail outlets.[25] Such a merchant frequently shifts for part of a day, or some other temporary interval, workers from one branch to another, and he arranges promotions from one

---

chandise''). Com. Mass., Dept. of Labor and Industries, Labor Bulletin No. 182, *Thirty-Ninth Annual Directory of Labor Organizations in Massachusetts.* See *Occupations in Retail Stores, supra,* p. 88.

[23] Compare the statement of Nystrom, P. H., *Economics of Retailing* (3rd ed. 1930), Vol. II, pp. 12-13. ''The functions of a retail store, whether big or small, are approximately the same. The essential difference in the performance of these functions (13) in large or small stores is that in a large store there is usually a fine division of labor, and each function is performed by separate people, whereas in a small store many of the functions are combined and performed as the duties of single individuals.'' See his Table 22, Vol. II, p. 270.

[24] It is perhaps not commonly realized how large a percentage of the employees of even a medium sized retail establishment of which the petitioner furnishes a fair example are engaged in non-selling operations. Prof. Nystrom, supra, Vol. II, pp. 269-271, says that when sales reach an annual volume of two million dollars usually one-half of the employees are in non-selling operation, and as the sales increase the percentage of non-selling employees rises. To the same effect see Federal Reserve Bank of Boston, *Bulletin,* Dec. 1, 1925.

[25] In general, see the magazine *''Occupations,''* Vol. 18, p. 509 et seq., *''Handling Retail Personnel.''* As to employee discounts, etc., see Converse, P.D., *Employment, Wages and Labor Relations in Marketing,* Annals, Vol. 209, pp. 149, 154 (1940).

group to another,[26] and with this in mind "some of the largest retail stores in the country . . . conduct training for such non-selling groups as telephone operators, delivery men, inspectors and wrappers, elevator operators, section managers, assistant buyers, adjustment bureau clerks, stock room employees, office employees, etc." [27]

Thus, from every angle, the governmental, the union, and the employer, retail employees working for one employer are treated as being in one retail establishment, although they may work under different roofs. It can hardly be supposed that, in the absence of the clearest direction to the contrary, Congress intended to split this traditional unity.

3. *In matters other than labor policy, the divisions of an enterprise like the petitioner's are treated collectively as one "retail establishment".*

Authorities on distribution regard a retail enterprise as unitary despite the fact that the storage or office clerical work is done under another roof than the selling. Such authorities recognize that every retailer requires storage and clerical records and delivery.[28] From their viewpoint

[26] See the illuminating comments on promotions from one particular job to another set forth in the U.S. Dept. of Labor study already cited, *Job Descriptions for the Retail Trade.*

[27] Nystrom, P.H., *Economics of Retailing* (3rd ed. 1930), Vol. II, pp. 407-408; U. S. Bureau of Education, Bulletin No. 9, *Department Store Education* (1917).

[28] Craig, D.R. and Gabler, W. K., *The Competitive Struggle for Market Control*, The Annals, Vol. 209, pp. 84, 87-90 (1940). The Twentieth Century Fund, *Does Distribution Cost Too Much* (N.Y. 1939) (pp. 70-71) ("A retail store • • • stores the article until the consumer calls for it, sells it in the amount and form desired by the consumer and often delivers it to his home. • • • (p. 71) Sometimes, too, the retail store engages in processing • • • it may freeze ice cream, or grind coffee or fit and alter clothes bought by the customer. If it deals in coal, it may sell not only to homes but to factories, thus becoming to some extent an intermediary distributor.") Nystrom, supra, Vol. II, pp. 6, 13. Lew Hahn, *The Mer-*

if the business is to be regarded as in any way to be divided for analysis, the division is not according to physical location, but according to functions such as (1) merchandising, (2) superintendence, (3) publicity, and (4) finance accounting and control.[29]

The Federal Trade Commission, with the object of aiding retail merchants to improve their accounting methods by a simple system of accounts,[30] expressly advised retailers to include in a single statement with expenses of their retail outlets, expenses of their retail warehouse properties,[31] the salaries and wages of their delivery forces,[32] and other items not here material. And similar inclusiveness is regarded as appropriate by other authorities.[33]

In their periodical reports of department store stocks, the Federal Reserve Bulletins lump together stocks which department stores keep in retail outlets and stocks they keep in their own warehouses.[34]

It has been suggested [35] that because under census practice the Department of Commerce treats each physically

---

chants Manual (Published by National Retail Dry Goods Association, 1924), pp. 83-86. Filene, L., *Next Steps Forward in Retailing* (1937), p. 98.

[29] Nystrom, *supra*, Vol. II, pp. 19-20. See the more minute division in Craig and Gabler, *supra*. Compare Nystrom, P.H., *Retail Trade*, Encyclopedia Social Sciences, Vol. 13, pp. 346, 348-350.

[30] Federal Trade Commission, Report to 64th Cong., 1st Sess., Doc. No. 1355, *A System of Accounts for Retail Merchants* (July 15, 1916). Prefatory note by Chairman E. H. Hurley.

[31] Ibid., p. 11, Par. 8, p. 19.

[32] Ibid., p. 17.

[33] Harvard School of Business Administration, *Operating Results of Department and Specialty Stores in 1939;* The Twentieth Century Fund, *Does Distribution Cost Too Much (1939)*, p. 225.

[34] See, for example, Fed. Res. Bulletin, Vol. 24, p. 232, Vol. 25, p. 1128.

[35] See, opinion of court below, R-28, Footnote 2. [144 F. 2d 102, 105].

segregated part of a retail enterprise as a different "establishment", a reason exists for similar treatment of a retail enterprise under Section 13(a)(2). But the treatment in the former case is premised on the necessity of giving prime consideration to the geographical facts, while that consideration is of no importance in the matter at hand. Moreover, this practice in a single field seems to us not determinative particularly since the Bureau of the Census like the Central Statistical Board, treats the warehouse of every type of retailer as a "retail establishment".[36]

The Administrator may also seek some support from state chain store tax statutes which *sometimes* treat a retailer's warehouse as not a "retail establishment". But on this point there is a diversity of local views, some states regarding a retail warehouse as a "mercantile establishment" [37] and others regarding it differently, depending on whether the owner is a department store or national chain system.[38]

4. *The facts in the instant case require that all the petitioner's stores, together with its central office and warehouse be treated as a single "retail establishment".*

To the extent that the interpretation of Section 13(a)(2) may depend on specific facts,[39] the petitioner's business enterprise qualifies as one that must be considered a single "retail establishment".

---

[36]U. S. Dept. of Commerce, Census of Business, 1935, *Retail Distribution* Vol. I. *passim*. Central Statistical Board, *Standard Industrial Classifications*, published by the executive office of the President, Bureau of the Budget, Division of Statistical standards (1940)

[37]See *Liggett Co.* v. *Lee*, 288 U.S. 517, 531, line 18, construing Florida Laws of 1931, c. 15624, §2; *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95, line 1-3, construing W. Va. Acts of 1933, c. 36 §8.

[38]See *Great Atlantic & Pacific Tea Co.* v. *Morrisset*, 58 F. (2d) 991 aff. per curiam 284 U. S. 584, construing Virginia Acts of 1928, c. 45.

[39]See *White* v. *Jacobs Pharmacy*, 47 F. Supp. 689; *Walling* v. *Block*, 139 F. (2d) 266, cert. den. 321 U. S. 785.

The petitioner's central office and warehouse is the executive and record center, as well as the supply base for an integrated organization. All the retail outlets are centered in a relatively compact area near the City of Springfield, Massachusetts. The activities now carried on in the central office and warehouse are identical with what would, of necessity, otherwise be performed in the individual stores on a much smaller scale and at greatly increased cost. The centralization of stock clerks and record clerks is for convenience and economy of operation. Decisions as to how merchandise shall be divided among the stores are made by division superintendents. Accounting, payroll and inventory records are integrated, and while in accordance with sensible business practice, separate accounts for each store are maintained, the transfers of goods among the stores are frequent. Moreover, the business is conducted on essentially simple functional lines. There is no indication that proportionately greater charges for transportation are made against the stores farthest from the central warehouse or that the petitioner maintains any other similar intra-company accounts such as might justifiably be expected in a less integrated business.

It is clear, we submit, that in managerial and merchandising policy, the petitioner's enterprise is a unit and that the results of the Administrator's interpretation of Section 13(a)(2) is to split into two, that which is designed to be and is, but one.

B. Even If The Petitioner's Enterprise As A Whole Does Not Constitute One Retail Establishment, The Petitioner's Office And Warehouse Employees Are Engaged In A "Retail Establishment".

There are two propositions which the respondent must successfully counter if the judgment below is to be affirmed. We have thus far been concerned only with the first, namely,

the contention that the petitioner's entire enterprise is a retail establishment of which the central office and warehouse building is but a part. We regard legislative history, labor law, business practice, and the plain facts of the matter as against the view that each physically segregated unit of the petitioner's business must be considered separately when determining the applicability of the retail exemption. The second proposition is that the petitioner's central office and warehouse building is a *retail* establishment. We submit that even though the central building in question is treated as a separate establishment, it is a "retail establishment" and therefore Section 13(a)(2) is applicable to the petitioner's central office and warehouse employees who work there.

Many of the considerations and authorities marshalled in support of our argument on the first proposition are equally pertinent here. A central office and warehouse building is an essential part of the retail business which Congress intended to exempt and which was asserted to have been exempted. (See pp. 13-17, *supra*, and Appendix C.) Employees in such a building are often grouped with employees in retail outlets — in a single appropriate unit for collective bargaining; in a single state minimum wage order; in vocational job classifications; in governmental studies of labor conditions in the retail industry; in labor unions; in company personnel policies respecting working conditions, transfers, training, special privileges and the like (pp. 17-22, *supra*). Moreover as previously stated (pp. 22-25, *supra*) authorities on distribution, accountants and statistical agencies regard a retailer's central building as a retail establishment and a substantial number of tax statutes do likewise. Even the Bureau of the Census, upon which the respondent has relied, would regard the petitioner's central office and warehouse building in Springfield, Massachusetts as a "retail establishment". (If the respondent is to resort to the census to break up the peti-

tioner's business, he should at least label the pieces in the same way the census does.)[40] There is other statutory, judicial and administrative material not cited above to which reference may be made as indicating that a central office and warehouse building is a retail establishment.[41]

It may, however, be contended that the words of the statute themselves prevent the construction for which we contend; that if a central office and warehouse building is a retail establishment, it is not one that sells and so it cannot be maintained that the greater part of its "selling or servicing is in intrastate commerce". To such a contention, there

---

[40] U.S. Dept. of Commerce, Census of Business (1935), Retail Distribution, Vol. I, pp. 1-26, 1-27. *Ibid:* Special Reports, *Retail Operating Expense,* pp. 7 and 9. See also the Central Statistical Board, *Standard Industrial Classifications, supra.*

[41] (a) In the New York Labor Law, where the term frequently occurs, (see e.g. N.Y. Labor Law, §130, par. 1, §161, par. 1, §180, §180a, §181, §375, §390 and §391.) means "a place where * * * goods are offered for sale * * * and *includes a building * * * occupied in connection with such establishment.*" (N.Y. Labor Law of 1897, c. 415, §2, now Labor Law, §2, par. 11.) In interpreting this section the Attorney General of New York, in an opinion addressed to Hon. Frances Perkins, ruled that "buildings where goods are stored for sale are mercantile establishments though they are not the buildings where orders are taken." (1926 Op. N.Y. Atty. Gen. 108)

(b) In Massachusetts labor law, where the term also frequently recurs, (Mass. G.L. (Ter. Ed.) c. 149, §§48, 55, 56, 58, 60, 62, 66, 67, 86, 92, 95, 103, 113, 139, 152, 158A.) "mercantile establishment" includes any "premises used for the purposes of trade in the *purchase or sale* * * * of any goods." (Mass. Acts of 1887, c. 103, §5, incorporated in Mass. G.L. (Ter. Ed.) c. 149, §1.)

(c) Under the Oklahoma Workmen's Compensation Act, 85 Okla. St. Ann. §2, a separate warehouse of a retail drug company was held to be a retail establishment not a "wholesale mercantile establishment" or "transfer and storage business." *Veazey Drug Co.* v. *Bruza,* 169 Okla. 418, 37 P. (2d) 294.

(d) Under the Illinois Child Labor Act a coal yard where coal was stored for sale was held to be a "mercantile establishment." *Purtell* v. *Philadelphia & Reading Coal & Iron Co.,* 167 Ill. App. 125, 147; see s.c. 256 Ill. 110, 99 N.E. 899, 902.

is a threefold answer. First, the Act broadly defines "sale" or "sell" so that it "includes any consignment for sale, shipment for sale or other disposition."[42] The fact that no sales occur at the central building is immaterial, since shipments for sale and other disposition do occur. In the next place, it is doubtful whether the phrase has the special restrictive application suggested. We believe that Congress did not mean that a particular retail place of business had to sell in order to be "a retail establishment", but that it meant that if a particular retail place of business *did* sell at all, the exemption would apply only if 51% of the sales made were in intrastate commerce. Furthermore, it is to be noted that Congress used the word "establishment" instead of the word "store" presumably to include places where there are no sales.

A second contention may be offered in support of the respondent's position, namely, that a retailer's warehouse is so like a wholesaler's warehouse as to be classified with it rather than as a retail establishment. In addition to its being contrary to the record in the instant case, this contention is against sound economic reasoning and judicial precedent.

On the record here the petitioner does not sell from its central building to other retail merchants, or to institutions or to governments. This building is merely a place for stocking merchandise and for quartering executives, accounting, payroll, inventory, credit and like clerks. The only sales made by the petitioner's enterprise are made to the ultimate consumer at retail and in small quantities.[43]

---

[42]Section 3(k)

[43]"The words retail" and "wholesale" are commonly defined. not with primary emphasis upon difference between sales to an ultimate consumer and sales to one who intends to resell, but rather with reference to difference between selling in small quantities and selling in large quantities or in bulk." *Petros* v. *Sup't & Insp. of Buildings of City of Lynn*, 306 Mass. 368, 371, 28 N.E. (2d) 233.

Moreover, economic learning does not teach that this type of central building is analogous to a wholesaler's warehouse. The fact that both may buy in quantity and stock goods is not significant. These similarities are of less consequence than the dissimilarities. The retailer does not, but the wholesaler does, engage in quantity sales, assume for another company "the risk of price changes and physical deterioration"[44], and act as a middleman between the manufacturer and the ultimate seller, for each of which he performs important services.[45]

Finally, the distinction between the two types of warehouses has been repeatedly drawn by the courts. It has been pointed out in a ruling[46] in which all the Justices[47] of this Court concurred that:

> "Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida, is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to retail establishments to be sold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation."

And other decisions have emphasized that the retail character of a business is determined not by the nature of its purchases but by the nature of its sales.[48]

---

[44] Converse, P.D. and Huegy, H.W., *The Elements of Marketing* (1940), p. 109.

[45] Beckman, T.N., *Wholesaling* (1926), Chap. II, "Functions of the Wholesaler."

[46] *Liggett Co.* v. *Lee*, 288 U.S. 517, 537-538.

[47] See Cardozo J., dissenting, in *Liggett Co.* v. *Lee*, 288 U.S. 517, 583, line 11.

[48] *Cook* v. *Marshall County*, 196 U.S. 261, 274-275; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, 47, 48 (C.C.A. 2); *State* v. *Cohen*, 133 Me. 293, 177 Atl. 403, 405; *Petros* v. *Sup't & Insp. of Buildings of City of Lynn*, 306 Mass. 368, 28 N.E. 2d 233.

C. If Under The Fair Labor Standards Act, Employees Who Work In A Physically Segregated Central Office And Warehouse Building Which Functions As An Integral Part Of A Retail Business Are Regarded Differently From Employees Working In Other Locations, Anomalous And Confusing Results Will Follow.

If the phrase "retail establishment" were to be given the narrow scope proposed by the Administrator, there would be absurd consequences.

First, competing retail merchants would have different labor standards. The practical importance of this fact is brought into high relief when considered against the background of this instant case. The petitioner's business "is very competitive and wages are the largest item of cost outside the cost of merchandise." (R. 12) But under the Administrator's view, the Act would not apply to any part of even the largest retail enterprise under one roof, competing with the petitioner, yet it would apply to the petitioner. And similarly, under the construction of Section 13(a)(2), which the respondent urges, the Act would apply to parts of the small enterprise which had but two outlets,[49] or one outlet and one warehouse, or perhaps even one outlet connected by a passage-way with a storeroom.

There is an apparent similarity between the duties of employees in a warehouse attached to a wholesale business and the duties of employees who work in a warehouse that functions as an integral part of a retail business. The Administrator does not seek to go beneath the surface and fails to distinguish between these two groups of employees. Indeed, he has regularly made great point of the fact that a retail warehouse is in competition with a wholesale warehouse. We take the view that the fundamental differences

[49] It has even been suggested that the physically segregated store is not wholly exempt if it houses a receiving and reshipping room that services other branches. See W & H Opinion Letter, April 24, 1941 [C.C.H. Lab. Law Service ¶ 25, 551.54].

(see pp. 27, 28, *supra*) between wholesale and retail businesses dwarf the superficial and apparent similarities between the duties of employees and we urge that any rule for determining the status of employees in a retailer's warehouse under the Fair Labor Standards Act should not be developed on the false premise that the two groups of employees work for competing businesses. Inherent in the position taken by the Administrator is the erroneous assumption that a wholesaler's warehouse which supplies local merchants is subject to the Act. *Cf. Higgins* v. *Carr Brothers Co.*, 317 U.S. 572. The competition for the petitioner issues from other retail grocery stores, not from wholesalers. The principal competitors of retail merchants invariably are other retail merchants and not wholesalers. To subject to the Act some merchants and not others because of the accident of where they store their goods, creates a ridiculous disequilibrium in the competitive situation.

Second, within the same enterprise, employees of the same employer doing identical tasks would be subject to different labor laws. There are many identical tasks in the retail outlets and in the central building. Without attempting an exhaustive survey we suggest that receivers, stock men, taggers, maintenance personnel do virtually the same work irrespective of whether their place of employment happens to be a warehouse or a store. It will promote disharmony among workers and business confusion to have different labor standards. And this chaos will be aggravated in the case of persons who are temporarily or permanently transferred from a branch which, under the Administrator's view, is regarded as covered to one which is regarded as exempt.

In addition to labor confusion and bookkeeping confusion, there may be judicial confusion. The unhappy experience of the federal courts with the Second Federal Employer's

Liability Act[50] before the 1939 Amendment[51] is so fresh in the minds of judges[52] and has been the subject of such acid comment[53] as to require no restatement. Surely that unfortunate experience in the railroad industry ought not to be repeated in the more complicated, diversified and far-flung retail industry.

Indeed no one realizes better than the Administrator himself the confusion which results from dividing an industry

---

[50] 35 Stat. 65; U.S.C.Ti. 45, §51.

[51] 53 Stat. 1404; U.S.C. Ti. 45, §51.

[52] Frankfurter & Landis, *The Business of the Supreme Court at October Term* 1931, 46 Harvard Law Review 226, 240-243 (1932).

[53] Schoene, L.P. and Watson, F., *Workmen's Compensation on Interstate Railways*, 47 Harvard Law Review 389 (1934). From this article it will enough to quote the following from pp. 404-405:

"Unloading rails and ties to be used in an interstate track is held to be an activity within the special province of the Federal Government, but it becomes a matter of state concern exclusively if the rails and ties are not to be used in the immediate future. So, too, removing worn rails is interstate commerce. But courts have not been able to reach such unanimous agreement with reference to loading the old rails on cars for the purpose of hauling them away after their removal. Two courts settled the conflict by finding that the old rails had not outlived their usefulness but were to be used again in an interstate track. Another court gratefully noted as controlling the fact that the section-foreman had divided his crew into halves, so that one half removed the rails while the other half carried them away. In the face of distinctions like these, it is not startling to learn that one who repairs a spur track leading to scales on which interstate cars are weighed is engaged in interstate commerce while one who is repairing the scales themselves is not.

"Another task whose character seems to be well settled is that of repairing a bridge over which an interstate track runs. The interstate quality of the activity is held to extend to unloading materials to be used in making such repairs, to hauling materials to the site of the repairs, to riding there to aid in the repairing, and to cooking meals for the workmen. But if the old bridge is beyond repair, removing it is not interstate commerce, nor is working on an abutment for a new bridge to take its place. And if the bridge is so small as to be properly termed a culvert, activity with reference to it cannot be dignified with an interstate character."

into exempt and non-exempt parts. He has been vigilant to include within the Act all employees of an employer engaged in production, whether the individual employee was or was not producing goods. He has said that a production employer would not hire an employee unless he were necessary for production.[54] There the Administrator has taken a common-sense, practical view. We suggest the same sort of realism in dealing with retailers. The part-in-part-out program would work as poorly in retailing as in any producing industry. And retailers, just like producers, take on employees only if they are necessaray to the establishment.

Summarizing, we respectfully submit that whether the petitioner's enterprise be regarded as one or as fifty establishments, the employees who work in its central office and warehouse building are engaged in a "retail establishment" and that the exemption set forth in Section 13(a)(2) of the Fair Labor Standards Act applies to them.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

CHARLES B. RUGG,
Amicus Curiae

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

February, 1945.

---

[54]U.S. Dept. of Labor, Wage and Hour Division, Interpretative Bulletin No. 1, par. 5 (Oct. 12, 1938). [Reprinted in 1942 Wage and Hour Manual (*supra*) p. 22].

APPENDIX A.

American Retail Federation

Member Associations

Nineteen National Associations

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Limited Price *Variety* Stores Association
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of Credit *Jewelers*
National Association of Retail *Clothiers* and *Furnishers*
National Association of Retail *Druggists*
National Association of *Food* Chains
National Association of Retail *Grocers*
National Association of *Music* Merchants
National Council of *Shoe* Chains
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute
Retail *Credit* Institute of America

Thirty State Associations

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa,* Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)
Maryland Council of Retail Merchants

Massachusetts Council of Retail Merchants
Michigan Retail Institute
Mississippi Retailers' Association
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants, Inc.
North Carolina Merchants Association, Inc.
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Oregon State Retailers' Council
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*
West Virginia Retailers Association, Inc.

APPENDIX B.

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .

APPENDIX C.

Legislative History of Retailer's Exclusion From the Act.

1. *President's Message.*

On May 24, 1937 the President sent a message recommending to the First Session of the Seventy-Fifth Congress national legislation with respect to the wages and hours of certain employees. The message (H. Doc. 255, set out in 81 Cong. Rec. 4960 and 4983 and in S. Rep. No. 884, p. 1, and H. Rep. No. 1452, p. 5) said in part:

"Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of *industrial workers* and to strengthen and stabilize the markets for the farmers' products. • • •

"One of the primary purposes of the formation of our Federal Union was to do away with the trade barriers between the States. To the Congress and not to the States was given the power to regulate commerce among the several States. Congress cannot interfere in local affairs but when goods pass through the channels of commerce from one State to another they become subject to the power of the Congress, and the Congress may exercise that power to recognize and protect the fundamental interests of free labor.

"And so to protect the fundamental interests of free labor and a free people we propose that *only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce.* Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade. • • •

"Although a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend, *there are many purely local pursuits and services which no Federal legislation can effectively cover.* No State is justified in sitting

idly by and expecting the Federal Government to meet State responsibility for those labor conditions with which the State may effectively deal without fear of unneighborly competition from sister States. *The proposed Federal legislation should be a stimulus and not a hindrance to State action.* • • •

"Legislation can, I hope, be passed at this session of the Congress further to help those *who toil in factory* and on farm."

2. *Original Bill, S. 2475, H. R. 7200.*

On the same day bills S 2475 and H. R. 7200, identical save in two unimportant particulars, were introduced in the Senate and House of Representatives, respectively (81 Cong. Rec. 4961 and 4998). This Bill did not expressly exempt local retailers.

(a) The policy of the proposed Act was declared to be "prohibiting the shipment in interstate commerce of goods produced under substandard labor conditions and • • • the elimination of substandard labor conditions in and directly affecting interstate commerce." (Compare Section 2(b) of the Act).

(b) The basic sections provided for the application to "employees in any occupation in which such employees are engaged in interstate commerce or are engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce" of (1) statutory minimum wages and maximum hours (Sections 2 (a) (10) and (11) and 4; compare Sections 6 and 7 of the Act) and (2) administrative orders, to be issued industry by industry with the advice of industry committees, prescribing minimum wages and maximum hours (Sections 5 and 14; compare Sections 5 and 8 of the Act).

(c) The Bill also contained various supplementary provisions including sections authorizing the administrative authority to issue wage and hour orders with respect to (1) those engaged in intrastate commerce when those embraced

within the basic sections (summarized in (b) above) are discriminated against or put at a competitive disadvantage (Section 8(a)) or (2) any occupation in which substandard wages and hours of any employer or class of employers (A) tend to lead to labor disputes directly burdening or obstructing interstate commerce, (B) directly affect the movement or price of goods in interstate commerce, or (C) are maintained with the intent to divert or substantially affect the movement or price of goods in interstate commerce (Section 10).

3. *Committee Hearings.*

Joint Hearings were held on the Bill before the Senate Committee on Education and Labor and the House Committee on Labor, beginning June 2, 1937, at which the scope of the Bill was extensively considered.

(1) A memorandum (See Joint Hearings before Senate and House Labor Committee on S. 2475 and H. R. 7200, pp. 54-62) submitted by Robert H. Jackson, then Assistant Attorney General, explaining the scope and judicial precedents for the various provisions, shows that but for the supplementary provisions (see paragraph 2(c) above) local retailers were not included within the purview of the Bill:

(a) "While the *main regulatory features of the bill are thus directly confined to interstate commerce*, the bill recognizes the necessity for protecting employers who produce for interstate markets from competition of overreaching employers engaged only in local trade" (Joint Hearings, *supra*, p. 59) and "further regulates conditions of employment by requiring the maintenance of fair labor standards in particular situations directly affecting interstate commerce." (*Ibid.*, p. 56)

"While the bill closes the channels of interstate commerce to goods produced under unfair labor conditions, the *bill does not attempt to cover purely local pursuits or intrastate service trades.*" (*Ibid.*, p. 56)

(b) The precedents upon which the regulation of working conditions of employees "engaged in interstate commerce" (Section 7(c)) were stated to be based are: "*Wilson* v. *New*, 243 U. S. 332; *Virginia Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515; *Washington, Virginia and Maryland Coach Co.*, v. *National Labor Relations Board*, 301 U. S. 142 (Joint Hearings, *supra*, p. 59).

The precedents cited for the provisions designed to protect interstate commerce from unfair competition by local commerce (Section 8(a)) are: *Shreveport Rate Cases*, 234 U. S. 342; *Railroad Commission* v. *Chicago, B. & Q. R. R.*, 257 U. S. 563 (*Ibid.*, pp. 51-59).

And the precedents cited for the various subdivisions of Section 10 (set out in paragraph 2(c) (2) above) in addition to the Wagner Act cases, are respectively: (A) and (C) *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; and (B) *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (*Ibid.*, pp. 52-53, 60).

(2) In discussing the scope of the Bill, Mr. Jackson also brought out at several points that the Bill was directed at the producer and not local retail enterprises, and that a retailer, even though making his purchases in interstate commerce, would be covered only (1) where he was located near, and sold his goods by delivery across, a State line and (2) where by his labor practices he affected interstate commerce through competition with those engaged in such commerce:

(a) Thus,

"it is *not intended by this bill to affect the retail trades or the service trades.* It is *intended to catch the unfair labor practices at the point of production* • • •. They must be fair goods if they move across the State line." (Joint Hearings, *supra*, pp. 39-40.)

Again: "The purpose of the law is to apply to (sic.) it to the *producer rather than to the seller.*" (*Ibid.*, p. 71.)

(b) In response to the question whether the Bill applied to "retail stores of the chain-store variety, that is, those stores that sell in the retail market but who move goods across State lines," he said:

"You would have to establish just that they were engaged in interstate commerce to a substantial extent in themselves, or you would have to establish the competitive feature I have mentioned [between intrastate and interstate commerce]. *It is hard to conceive of the latter situation arising whereby local businesses would be subject to this law.*"

And to the further question whether the Bill applied to such an organization as the A. & P., National Grocery or Woolworth stores which "certainly are engaged in interstate commerce," he replied:

"Before you would be able to reach a situation of that kind you would have to find that the practices did, to a substantial degree, affect interstate commerce." (Joint Hearings, *supra*, pp. 24-25).

(c) To a request by Chairman Black for an explanation "under just what circumstances and under what circumstances only, it would be possible for the regulation of *retail establishments* and small business enterprises to come under this bill," Mr. Jackson said:

"There are *only two ways in which a retailer* • • • *would be affected* • • •. One would be the *retailer who is located close to a State line* and sold his goods by delivery across a State line, and the other would be the case of a *local retailer, who by his labor practices and standards was able to affect the interstate movement of goods.* In other words, if a merchant in interstate commerce such as Sears, Roebuck should be able to convince the Board that a local merchant's labor standards were enabling him to compete unfairly with Sears, Roebuck, then that local merchant might be required to adopt fair standards. Of course, while that is possible legally, it is very far fetched as a practical

proposition. Practically, the situation in which a local merchant might be affected would be if he were moving his goods in the course of delivery across the State line to a substantial extent so that he were engaging in interstate commerce; but, generally speaking, *the policy of the bill is not to include the service trades and small businesses and the retailing enterprises* • • •. As a practical proposition, *the bill does not affect the retail trades.*"

He acknowledged as "a correct statement of the purpose of the bill" the statement by Chairman Black that "the bill shows on its face, • • • from beginning to end, that it is intended to provide standards for those business units that are actually engaged in and substantially and materially affecting interstate commerce • • •, leaving to the States and the local communities themselves, the power of regulating the small business units that affect the local community only" (Joint Hearings, *supra,* pp. 35-36).

(d) As to the converse case, interference with the local merchant by mail-order houses like Sears, Roebuck which also maintained a chain of stores, he stated that the local merchant could complain "in so far as their mail-order business is concerned," as that was "interstate commerce," but it did not necessarily follow that the local store was "in interstate commerce," though it would be where it is "an agency for taking orders to be transmitted" out of state for filling. Where complaint could be made, he explained, the basis would have to be Sears, Roebuck's interstate business and not the effect on the local merchant's business, who "is not engaged in interstate commerce," even though "all of the country merchant's stock were received in interstate commerce [and] he is constantly selling from that stock and replenishing it through interstate-commerce channels" (Joint Hearings, *supra,* pp. 36-37).

(3) Mr. Leon Henderson, in estimating the number of employees which the proposed Act will cover, included those engaged in "industry" but excludes those engaged in "distribution and service" (Joint Hearings, *supra,* p. 159).

4. *Senate Committee Bill and Report and Debate in Senate.*

The Senate Labor Committee reported out S. 2475 with substantial amendments together with Senate Report No. 884 (75th Cong. 1st Sess.) on July 8, 1937 (81 Cong. Rec. 6894). After debate, the Senate passed the Bill on July 31, 1937 (81 Cong. Rec. 7957). The Bill, as amended, the Committee Report and the debates show clearly that local retailers were excluded from the scope of the proposed Act even in those cases where they would have been covered by the original Bill.

(1) The Bill as reported out by the Committee was amended in the following respects:

(a) An exemption was given with respect to "any person employed in a bona fide * * * local retailing capacity (as * * * defined and delimited by regulations of the Board)" by means of exclusion from the definition of "employee" (Section 2(a)(7)).

(b) The scope of the Bill was restricted to regulating the wages and hours of employees "engaged *in* interstate commerce or *in the production of goods intended for*" interstate commerce (Sections 4 and 7), with the one exception of the case of the wages and hours of employees engaged in "the production of goods in one State" which are sold locally in competition with goods "produced in another State and sold or transported in interstate commerce" (Section 8(a)).

(2) The Committee Report stated:

"The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the nation in so far as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to state and local communities their own responsibilities concerning those local service and*

other business trades that do not substantially influence the stream of interstate commerce."

The Report then states the reason for the "local retailing capacity" exemption:

"For example the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near state lines, and solely on account of such location, actually serves a wholly local community trade within two states" (Sen. Rep. No. 884, *supra*, p. 5).

(3) The debates confirm the understanding that local retailers were not included within the scope of the Bill and show the reasons for that exclusion:

(a) In introducing consideration of the Bill, Senator Black, Chairman of the Senate Committee on Labor, said:

"It provides a method of obtaining the objective of minimum wages and maximum working hours in industries throughout the Nation which engage in the transportation of their goods in interstate commerce. *It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied peculiarly local business units of the Nation.* * * * So the bill, in so far as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated (Section 8(a), summarized above in paragraph 4(1)(b)), to goods which are actually manufactured for transportation and are transported in interstate commerce. *We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service employments throughout the Nation*" (81 Cong. Rec. 7648). The reason for this limitation, he said, was twofold:

Firstly, because the Bill "rests squarely upon the interstate commerce clause" of the Constitution, and, secondly, because it was the "prevailing," if not "unanimous," sentiment of the Committee that

"businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the states in which the business units operate." (81 Cong. Rec. 7648).

And, he continued:

"With reference, however, to the regulations covering business units that ship their goods in interstate commerce, the bill is offered with the belief that it is impossible today to expect that any one local community can tend to bring about the proper regulation of the business of producing such goods to be scattered throughout the entire 48 States" (81 Cong. Rec. 7648).

(b) In response to a criticism by Senator George that, "All retail clerks and helpers in retail establishments * * * are out of the bill," Senator Black responded:

"May I ask the Senator whether he believes that under the definitions which have been given of interstate commerce, it would be possible for the Congress to regulate the hours of those working in the retail stores throughout the country?" (81 Cong. Rec. 7785).

(c) See also: Senator Black stating that the Bill differed from the N. R. A. in applying "only to interstate industries," with the exception of Section 8(a), that the number of employees estimated to be covered did not include those engaged in distribution and service, and that "Federal Standards will * * * stimulate State legislation for local industry" (81 Cong. Rec. 7745, 7746); the use of "establishment" to mean a business organization by Senator Walsh (*Ibid.*, pp. 7800-7801) and Senator Black (*Ibid.*, p. 7867).

5. *House Committee Bills and Reports and Debate in House.*

(1) The House Labor Committee reported out S. 2475 in substantially the form passed by the Senate together

with H. Rep. No. 1452 (75th Cong., 1st Sess.) on August 6, 1937 (81 Cong. Rec. 8478), but the Bill did not come to a vote in the First Session.

(2) In the Second Session, the House debated the Bill and recommitted it to the House Committee on Labor on December 17, 1937 (82 Cong. Rec. 1834-1835). During the debate:

(a) Representative Norton, Chairman of the House Labor Committee, stated in the course of a long comparison of the proposed law with the N. R. A., that this Bill leaves "local business" to "the protection of the laws of the several States" and "would affect only those agencies of business which are now subject to Federal regulation" (82 Cong. Rec. 1392); and enumerated 23 States with minimum-wage laws which were studied by the Committee, calling attention to the District of Columbia law under which a "retail-trades" wage order was stated to have been issued a short while before (*Ibid.*, p. 1789).

(b) See also statements with respect to those not covered by the Bill: "thousands of workers in department stores and 5 and 10 cent stores and other purely intrastate businesses" (Representative Hartley, 82 Cong. Rec. 1394); "employees in retail establishments, including the big department and chain stores, as well as the small independent ones" (Representative Mapes, *Ibid.*, p. 1399); and statement by Representative McLean in discussing the analogy between the proposed law and the N. R. A.: "The admission is made that this bill was drafted to meet the opinion of the Supreme Court setting aside the N. R. A." (*Ibid.*, p. 1492.)

(3) In the Third Session, the House Committee on Labor reported out S. 2475 with substantial amendments together with H. Rep. No. 2182 (75th Cong., 3rd Sess.) on April 21, 1938 (83 Cong. Rec. 5680). After prolonged debate, during which an amendment to make clear the Congressional purpose to exclude local retailers was made from the floor and

adopted, the House passed the Bill on May 24, 1938 (83 Cong. Rec. 7449).

(a) This Bill was of broad scope. The declared policy was "prohibiting the shipment in commerce of goods produced under substandard labor conditions" and "the elimination of" such "conditions in occupations *in* and *affecting* commerce" (Section 2(b)). It provided for the application of statutory wage and hour standards to employees of any "employer engaged in commerce in any industry *affecting commerce*" (Sections 4 and 5). An "employer engaged in commerce" was defined as "an employer in commerce, or an employer engaged, in the ordinary course of business, in *purchasing* or selling goods in commerce" (Section 3(k)). An "industry *affecting* commerce" included, among others, any industry found by the administrative authority to be "dependent for its existence upon substantial *purchases* or sales of goods in commerce and upon transportation in commerce". In this Bill, the "local retail capacity" exclusion was shifted, together with other exemptions, to a separate section (Section 11).

(b) The provision authorizing the administrative authority to bring businesses making "*purchases*" in interstate commerce within the Act brought forth considerable objection in the debates that local "retail establishments" might thereby be encompassed, despite the "local retailing capacity" exemption which was subject to delimitation by the administrative authority (*e. g.*, Representative Dies, 83 Cong. Rec. 7275; Representative Celler, *Ibid.*, p. 7393-7394). Chairman Norton took cognizance of this criticism, but, supported by Representative Healey speaking for the Committee, assured the House that, despite purchases in other states, "*local retailers" were excluded;* that it "is clearly understood" that *the Bill "absolutely exempts retailing"* (*Ibid.*, pp. 7281-7282); and that not even by the "wildest stretch of the imagination" and "regardless of any possible administrative interpretations" such businesses as the "local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital,

hotel, or even transportation companies operating solely within a State" were "absolutely not" in any way affected by the Bill (*Ibid.*, p. 7299). Representative Healy also stated that "*retail establishments are absolutely out of the provisions of the Bill*", because to include them "would exceed the powers of Congress" which is "limited by the Constitution to business in interstate commerce. (Applause)" (*Ibid.*, p. 7308).

(c) Not satisfied with these assurances, however, House members offered three amendments from the floor so as, "without equivocation or reservation" (Representative Celler, 83 Cong. Rec. 7393-7394), to exclude local retailers from the proposed Act. Successive amendments to Section 6, offered by Representatives Massingale and Pearson, which would have eliminated "*purchases*" in interstate commerce as a sufficient basis for the application of the Bill, were defeated on the insistence by Chairman Norton that the amendment was unnecessary as it had "been *stated time and time again that local retailing is exempt from the Bill*" (*Ibid.*, pp. 7436, 7437). The third amendment, offered by Representative Celler, that no order by the administrative authority under Section 6 of the Bill

"shall be applicable to any retail industry, the greater part of whose sales is in intrastate commerce"

was adopted after his plea to "dissolve all doubt, dispel all chance of misinterpretation" and to make "clear beyond peradventure of a doubt that retailing is exempted" and that "any industry whose sales are substantially in intrastate commerce shall be exempted from the operation of the Act" and after Chairman Norton's request that the amendment be accepted to clear up the doubt (*Ibid.*, p. 7438).

6. *Conference Report and Debate.*

The bills passed by the Senate and House, respectively, went to Conference. After changes in Conference in both Senate and House bills and a report (H. Rep. No. 2738

(75th Cong. 3d Sess.), 83 Cong. Rec. 9158, 9246), the report was agreed to and the Bill was enacted on June 14, 1938 by the Senate (*Ibid.*, p. 9178) and the House (*Ibid.*, p. 9266). The changes made in the bills by the Conference Committee confirm the express exemption given to local retailers under the amendment adopted during debate in the House and retained in Conference by the clear exclusion of them from the scope of the regulatory provisions (Sections 6 and 7) of the Act.

(1) The "local retailing capacity" exemption of both bills was retained (Section 13(a)(1)).

(2) The amendment to Section 6 of the House Bill excluding local retailers which was adopted during debate in the House (see paragraph 5(3)(c), *supra*) was retained.

(a) Because of the deletion of Section 6 (see paragraph (3)(b), *infra*), the provision was shifted to the section embracing the other exemptions (Section 13); the exemption was expanded to embrace local "service" as well as local "retail" businesses; and the provision was improved by substituting the word "establishment" for "industry," because of the use of "industry" elsewhere (Sections 3(h), 5 and 8) to refer to a group of businesses.

(b) That no change in scope was intended is shown by the Conference Report:

"Section 13 • • • includes an exemption from both the wage and hour provisions of employees of retail or service establishments the greater part of *whose business* is in intrastate commerce" (H. Rep. No. 2738, p. 32).

(3) Significant restrictions in the scope of the bills, particularly the House Bill, were made.

(a) The declared policy of the Act was made to read: "to eliminate" substandard "labor conditions" "in industries engaged *in* commerce or *in the production of goods for* commerce" (Section 2).

(b) The regulatory provisions were restricted to the wages and hours of "employees" and "industries" "engaged *in* commerce or *in the production of goods for* commerce" (Sections 5, 6, 7 and 8); every provision in the House Bill covering an "industry *affecting* commerce" or an industry making "*purchases* • • • in commerce" (see paragraph 5(3, a), *supra*) and even the provision in the Senate Bill including those producing and selling goods in one State in competition with goods from other States (see paragraph 4(1)(b), *supra*), were deleted.

(4) Debate in the Senate and House:

(a) The discussion in the Senate (83 Cong. Rec. 9165-9178) with respect to the scope and constitutionality of the Bill, in particular statements by Senators Borah (*Ibid.*, pp. 9166-9176, *passim*) and Wagner (*Ibid.*, p. 9173 with respect to the scope of the Wagner Act) was all directed toward the case of a manufacturer shipping goods in interstate commerce in response to criticism by Senator Bailey that regulation of the wages and hours of a manufacturer's employees was unconstitutional (*Ibid.*, pp. 9165-9175, *passim*). Accordingly, they have reference only to the scope of the provisions with respect to employees and industries "*engaged in the production of goods for commerce*" and have no bearing on the scope of the provisions with respect to those "*engaged in commerce.*"

(b) Statements by Senate members of Conference Committee:

"Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish *traffic in interstate commerce* • • • in the products of underpaid and overworked labor. I think that many of the conference committee feel that our common objective has probably been more effectively and wisely obtained in the conference agreement than it would have been obtained in either the Senate or House bill" (Senator Thomas, 83 Cong. Rec. 9163).

After quoting the initial parts of Sections 6 and 7, Senator Pepper said,

"The conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce. * * * I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee" (*Ibid.*, p. 9168).

"All businesses engaged in interstate commerce and local retail establishments, the greater part of whose selling are goods that move in interstate commerce" are affected by the Bill. "*The Bill does not in any way affect purely local retail or service businesses*" (Senator Walsh, *Ibid.*, p. 9176).

(c) During debate in the House, Representative Schneider said,

"The measure as reported out by the conference report applies to interstate business exclusively. This is, of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect interstate or purely local or State business. It covers only interstate commerce; that is, business which is interstate in character" (83 Cong. Rec. 9260).

SUPREME COURT OF THE UNITED STATES.

No. 608.—October Term, 1944.

A. H. Phillips, Inc., Petitioner,
vs.
L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 26, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Section 13(a)(2) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1067, 29 U. S. C. § 213(a)(2), states that the wage and hour provisions of the Act shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The issue posed by this case is whether employees working in the warehouse and central office of an interstate grocery chain store system are "engaged in any retail . . . establishment" within the meaning of Section 13(a)(2) so as to be exempt from the wage and hour provisions.

The petitioner corporation operates a chain of 49 retail grocery stores in cities and towns within a 35-mile radius from Springfield, Massachusetts. Of these stores, 40 are in Massachusetts and 9 are in Connecticut. Quite apart from these retail stores, petitioner maintains a separate warehouse and office building in Springfield in which work the employees involved in this case.

The warehouse is the only one maintained by petitioner and it services all the 49 stores. Except for bread, pastry and milk, which are secured from local sources, all of petitioner's merchandise is delivered by rail and truck to the warehouse where it is divided and then delivered by petitioner's trucks to the individual stores according to need. About 80% of the merchandise passing through the warehouse is received from outside Massachusetts, while about 18% of the total sales by dollar volume of the merchandise shipped from this warehouse is accounted for by petitioner's Connecticut stores. Each week a regular order is delivered

to each store from the warehouse and additional deliveries are made as required. Merchandise is supplied on the basis of requisitions prepared by individual store managers, subject to revision by one of the three superintendents in the central office. All of petitioner's sales are made exclusively at the retail stores and no deliveries to customers are made from the warehouse.

Employees in the central office, which is located in the same building as the warehouse, perform the usual functions of checking invoices, paying bills, making out payrolls, keeping inventory records, checking store deliveries and the like. The various employees in the warehouse and the truck drivers handle the physical work connected with the receipt, storage and shipment of merchandise. None of these employees segregates his time as between interstate and intrastate shipments; both types of shipments are handled indiscriminately to and from the warehouse.

On the basis of these facts, the Administrator of the Wage and Hour Division sought to enjoin petitioner from violating the overtime and record provisions of the Act. The District Court granted the injunction, holding (1) that the warehouse and central office employees were engaged in interstate commerce within the meaning of the Act and (2) that they were not exempted from the wage and hour provisions by reason of Section 13(a)(2) since the warehouse and office building did not constitute a retail establishment. 50 F. Supp. 749. The First Circuit Court of Appeals affirmed as to both points. 144 F. 2d 102. Petitioner, however, has sought review here only as to the second point. And certiorari was granted because of the conflicting views expressed on this issue by lower appellate courts.[1]

The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within

[1] The decision below in this case is in accord with the reasoning of Walling *v.* American Stores Co., 133 F. 2d 840 (C. C. A. 3), but is in conflict with Allesandro *v.* C. F. Smith Co., 136 F. 2d 75 (C. C. A. 6), Walling *v.* L. Wiemann Co., 138 F.2d 602 (C. C. A. 7), and Walling *v.* Block, 139 F. 2d 268 (C. C. A. 9).

its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. We accordingly agree with the two courts below that the exemption contained in Section 13(a)(2) is inapplicable in this case and that the employees involved are entitled to the benefits of the wage and hour provisions of the Act. We hold, in other words, that the warehouse and central office of petitioner's chain store system cannot properly be considered a retail establishment within the meaning of Section 13(a)(2).

It is necessary, in the first place, to understand the true nature of petitioner's warehouse and office. The prime function of petitioner's chain store system is to sell groceries at retail. Like most large chains, however, petitioner has found it economically feasible to perform and integrate both the retail and wholesale functions of the grocery business. The independent wholesaler or middleman has been eliminated from the channel of distribution of petitioner's merchandise. Petitioner not only operates the retail outlets but purchases the merchandise in quantity from producers, stores it in a warehouse and systematically allots it to the individual stores. Certain economies in operation result from this direct mass buying and centralized merchandising control which would otherwise be impossible to achieve.[2] A warehouse and a central office such as petitioner maintains are vital factors in this integration of the retail and wholesale functions. They are necessary instruments for the successful performance of the wholesale aspects of a multi-function business of this type.

There are, to be sure, certain distinctions between the wholesale activities of a chain store system and those of an independent wholesaler. Thus a chain store enterprise does not customarily sell merchandise in its warehouse to retailers or other wholesale customers as does an independent wholesaler.[3] The goods stored in a chain store warehouse are merely distributed rather than sold to the retail stores. See *Liggett Co.* v. *Lee*, 288 U. S. 517, 537, 538. But this and other differences that can be found arise from the fact that the chain organizations have completely meshed the retail and wholesale functions. Many of the costs and risks

[2] See Beckman and Nolen, The Chain Store Problem (1938), pp. 48-50.

[3] Although petitioner's warehouse apparently does no wholesale business with independent retailers, many chain store warehouses sell certain quantities of merchandise to outside retailers in addition to supplying their own retail outlets. Beckman and Nolen, The Chain Store Problem (1938), p. 8.

normally assumed by the wholesale merchant because of his independent and competitive nature are eliminated by the chain store organization. The resulting savings and simplifications serve only to emphasize some of the major effects of the apparent trend away from the independent middleman in our economy of distribution.[4] The disappearance of the independent middleman, together with many of his separate operations and charges, does not mean, however, that his essential intermediary or wholesale function of moving goods from producer to retailer has been abolished. In this instance it has only been taken over by the retailer, acting through its own distinct wholesale units.[5]

In a realistic sense, therefore, most chain store organizations are merchandising institutions of a hybrid retail-wholesale nature. They possess the essential characteristics of both the retailer and the wholesaler. Their wholesale functions, which are integrated with but are physically distinct from their retail functions, are performed through their warehouses and central offices. That fact is the essential key to the problem presented by this case. It serves to make clear the inapplicability of Section 13(a)(2) to petitioner's warehouse and central office employees.

Section 13(a)(2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce. Petitioner claims that its retail stores, warehouse and central office together constitute a "retail establishment" within the meaning of this exemption. The lack of merit in this claim is obvious. Even if, as petitioner urges, the word "establishment" referred to an entire business or enterprise, the combined retail-wholesale nature of petitioner's inter-

[4] Does Distribution Cost Too Much?, Twentieth Century Fund (1939), pp. 81-85, 100-110, 178-181, 345-346; Beckman and Nolen, The Chain Store Problem (1938), pp. 7-9, 42-61; 15 Encyclopaedia of the Social Sciences (1935), pp. 411-416.

[5] "While it is frequently said that the function of wholesaling is vital even though the wholesaler may not be in every line, some amplification of this remark seems advisable. *Some agency must provide the machinery to move all merchandise from the producer to the retailer. Regardless of what this function is called, it is essentially the same as wholesaling.* . . . Chain stores, once they assume enough importance to justify a warehouse, are engaged in wholesaling as well as retailing. Whatever goods are handled at retail outlets must be bought in quantity, handled in the warehouse and allotted to the individual stores in much the same way that wholesalers would serve the independent dealers." Chamber of Commerce of the United States, National Wholesale Conference, Report of Committee I, Wholesalers' Functions and Services (1929), pp. 13-14.

te business would prevent it from properly being classified a local "retail establishment." But if, as we believe, Con-ess used the word "establishment" as it is normally used in siness and in government[6]—as meaning a distinct physical place business—petitioner's enterprise is composed of 49 retail es-blishments and a single wholesale establishment. Since the ployees in question work in the wholesale establishment, Sec-n 13(a)(2) is plainly irrelevant.

Moreover, it is quite apparent from the sparse legislative his-ry of Section 13(a)(2) that Congress did not intend to exempt a "retail establishment' the warehouse and central office of interstate chain store system. From the standpoint of its gislative ancestry, Section 13(a)(2) is the offspring of a mani-st desire to exclude from the scope of the Act "business in the veral States that is of a purely local nature." Sen. Rep. 884, th Cong., 1st Sess., p. 5. Congress was interested in exempting ose regularly engaged in local retailing activities and those em-oyed by small local retail establishments, epitomized by the rner grocery, the drug store and the department store.[7] It lt that retail concerns of this nature do not sufficiently influence e stream of interstate commerce to warrant imposing the wage d hour requirements on them. *Ibid*, p. 5. Section 13(a)(2) a part of the Act only because of the fear that Section 13(a)(1),

[6] Prior to the adoption of the Fair Labor Standards Act the term "estab-hment" was used in the sense of physical place of business by many sus reports, business analyses, administrative regulations, and state taxing d regulatory statutes. As applied to chain store systems, "establishment" s described each unit in the chain. For example, under the N. R. A. des of Fair Competition, prepared by committees from the industries ncerned, retail stores of a grocery chain were subject to the Retail Food d Grocery Trade Code, while the chain store warehouses and central offices re treated as separate "establishments" subject to the Wholesale Food d Grocery Trade Code. See N. R. A. Codes of Fair Competition, Vol. IV, 460-1, 470, and Vol. V, pp. 5-6, 13-14.

[7] The original language of Section 13(a)(2), introduced as as amendment Representative Celler, applied to any retail "industry." Representative ller stated that if the amendment were accepted "retail dry goods, retail tchering, grocers, retail clothing stores, department stores will all be empt." Several other Congressmen expressed their desire to assure the mption of "the corner grocery store man or the filling station man" and he local groceryman, druggist, clothing store, meat dealer—any merchant fact." 83 Cong. Rec. 7299, 7436-7438. The exemption as it finally emerged m the joint House-Senate conference committee applied to any retail "es-blishment" rather than "industry." The use of the word "establish-nt" is more appropriate to the small local retailers which Congress had mind and clearly indicates that Congress meant by it something less or fferent than "industry" or "enterprise."

in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

Here petitioner's warehouse and central office employees are performing wholesale duties in the very midst of the stream of interstate commerce. They constantly deal with both incoming and outgoing interstate shipments. Such tasks are completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13(a)(2). These duties, rather, are economically, functionally and physically like those of the independent wholesaler's employees who, when engaged in interstate commerce, are admittedly entitled to the benefits of the Act. We fail to perceive in Section 13(a)(2) or in its Congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage in labor cost over independent wholesalers.

We are thus unable to say that the warehouse and central office employees of petitioner's interstate chain store system plainly and unmistakably fall within either the terms or the spirit of the exemption specified in Section 13(a)(2). Economic facts, legal principles and consistent and thorough administrative interpretation[8] of the exemption all compel the conclusion that Section 13(a)(2) is not applicable to the facts of this case. We therefore affirm the judgment of the court below.

Affirmed.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

Mr. Justice ROBERTS dissents.

---

[8] See Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, originally issued in December, 1938, and revised in June, 1941. See also First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor (1940), p. 21, informing Congress that "each physically separated store of a chain of stores will be considered a separate 'retail establishment.' The warehouses and central executive offices of the chain are not 'retail establishments.'"